137-483

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1237.

CLIFTON HOLDEN, APPELLANT,

vs.

THE STATE OF MINNESOTA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED AUGUST 16, 1890.

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1 In the Circuit Court of the United States for the District of Minnesota, in the Eighth Circuit.

In the Matter of the Petition of CLIFTON HOLDEN for a Writ of *Habeas Corpus.*

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota of the June term, A. D. 1890, of said court, held in the city of St. Paul, in said district, in the year 1890.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 19th day of June, A. D. 1890, came the petitioner above named, by his attorney, and filed in the clerk's office of said court his petition for a writ of *habeas corpus* as follows, to wit:

2 To the circuit court of the United States for the district of Minnesota, in the eighth circuit:

The petition of Clifton Holden respectfully shows to this court that he is now imprisoned and restrained of his liberty and kept in solitary confinement by and in the custody of John B. Schmid, Esq., sheriff of the county of Brown, at New Ulm, in said district, in the jail of said county; that he is in such custody in violation of the Constitution of the United States; that the facts concerning his detention and the claim of authority therefor are, so far as they are known to your petitioner, as follows, viz:

On the 23rd day of November, A. D. 1888, at Redwood Falls, in the county of Redwood and State of Minnesota, one Frank Dodge came to his death from a pistol-shot wound in his head, and your petitioner was on the next day arrested and charged with having feloniously effected the death of said Dodge; that your petitioner has ever since been in jail and in the close custody of the executive officers of said State.

That afterwards, on May 14th, A. D. 1889, your petitioner was indicted in the district court of said State of Minnesota by the grand jury of said Redwood county for the crime of murder in the first degree, committed as aforesaid. A copy of said indictment so presented in said State court and of all the indorsements thereon is hereto attached, marked "Exhibit A," and made a part hereof.

3 That afterwards, on the 23rd day of May, 1889, your petitioner was brought to trial in said State court upon said indictment in said Redwood county, before a jury duly empaneled and sworn, and afterwards, on May 28th, 1889, the said jury duly rendered their verdict, whereby they found your petitioner guilty of murder in the first degree, as charged in said indictment. A copy of said verdict is hereto attached, marked "Exhibit B," and made a part hereof.

Your petitioner thereupon moved that court for a new trial, which

was denied; and on appeal the order denying a retrial was, on January 14, A. D. 1890, affirmed on the merits in the supreme court of the State of Minnesota and the determination remitted to said district court. (44 Northwestern Reporter, 123.)

That afterwards, on February 18th, 1890, the said district court in and for said Redwood county, Minnesota, adjudged your petitioner guilty of murder in the first degree, as charged in said indictment, and that your petitioner be taken to the common jail of Brown county, in said State, and there confined; and after the lapse of three months, at a time to be fixed by the Governor of said State and designated by his warrant, that your petitioner be hung by the neck, by the sheriff of said county of Redwood, until your petitioner should be dead; a copy of which said judgment is hereto attached, marked "Exhibit C," and made a part hereof.

That afterwards, on May 21st, A. D. 1890, at St. Paul, in said district, his excellency William R. Merriam, Governor of the State of Minnesota, issued to the sheriff of said county his warrant, dated that day and commanding that your petitioner be kept in solitary confinement from the date thereof until the 27th day of June, A. D. 1890, and that on that day your petitioner be hanged by the neck, by the said sheriff, until your petitioner be dead; that ever
4 since the date of said warrant he has been so confined. A copy of said warrant is also hereto attached, marked "Exhibit D," and made a part hereof.

Your petitioner respectfully shows to this court that by the said judgment of said State court his life is placed at the discretion of the executive of said State whether he shall die in three months or three years or in any other time; that by said judgment and said warrant your petitioner is deprived of his life without due process of law and at the discretion of the chief executive of the State, in violation of the fourteenth amendment of the Constitution of the United States.

Your petitioner further shows that after the death of said Dodge and before the trial of your petitioner for his murder the Legislature of the State of Minnesota passed an act which became the law of said State on April 24th, 1889, whereby the former law for the punishment of homicide was amended, so that any person convicted of murder in the first degree, instead of being hung, should be kept in solitary confinement, after the issue of the warrant aforesaid, to the time of execution, and then hung by the neck until dead. Said act repealed all acts and parts of acts inconsistent with the provisions of that act. A copy of said act is hereto attached and marked "Exhibit E" and made a part hereof.

Your petitioner respectfully shows to this court that the former laws of said State provided execution by hanging as punishment for murder in the first degree; that said former laws are inconsistent with the provisions of this act and are thereby repealed; and the said
5 act of April 24th, A. D. 1889, is, as to the said charge against your petitioner, an *ex post facto* law, and that your petitioner is in custody thereunder in violation of article one of section ten of the Federal Constitution.

Wherefore your petitioner prays this honorable court to issue to said John B. Schmid, sheriff of said Brown county, a writ of *habeas corpus* to inquire into the cause of such imprisonment and restraint.

CLIFTON HOLDEN.

STATE OF MINNESOTA, *County of Brown,* } ss:

Clifton Holden, the petitioner above named, being duly sworn, says on oath that he has heard read the foregoing petition subscribed by him and that he knows the contents thereof, and that the said petition is true.

CLIFTON HOLDEN.

Sworn to before me this June 12th, A. D. 1890.

[NOTARY SEAL.] C. A. HAGBERG,
Notary Public.

EXHIBIT A.

STATE OF MINNESOTA, *County of Redwood,* } ss:

District Court, Ninth Judicial District.

THE STATE OF MINNESOTA
against
CLIFTON HOLDEN.

Clifton Holden is accused by the grand jury of the county
6 of Redwood, in the State of Minnesota, by this indictment of the crime of murder in the first degree committed as follows:

The said Clifton Holden, on the 23d day of November, A. D. 1888, at the county of Redwood, in the county of Redwood and State of Minnesota, did, without authority of law and with malice aforethought, feloniously, with the premeditated design to effect the death of a human being and without excuse or justification, kill one Frank Dodge by then and there shooting him with a pistol, commonly known as and called a revolver, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Minnesota.

Dated at the grand-jury room, in the county of Redwood and State of Minnesota, this fourteenth day of May, A. D. 1889.

PARK WORDEN,
Foreman of the Grand Jury.

Names of witnesses examined before the grand jury:

Giles R. Pease, Phil. Miller, James McGowan, Edwin Brown, A. P. Clancy, Geo. Drake, C. W. Mead, F. L. Warner.

[Endorsed:] District court, ninth judicial district, county of Redwood. The State of Minnesota against Clifton Holden, defendant. Indictment. A true bill. Park Worden, foreman of the grand jury.

7 Presented to the court in open court by the foreman of the grand jury in the presence of the grand jury and filed with the clerk of court this 15th day of May, A. D. 1889.

J. L. BYRAM, *Clerk.*

M. M. MADIGAN,
County Attorney, Redwood County, State of Minnesota.

STATE OF MINNESOTA, } ss:
County of Redwood, }

I, J. L. Byram, clerk of the district court within and for said county, do hereby certify that I have compared the within and the indorsement thereon with the original indictment in the within-entitled action now on file and record in my office, and I do hereby certify that the same is a full, true, and complete copy of the same and the indorsement and filings thereon and true copies of the filings and indorsement on the original as appears from the records and files of my office.

Given under my hand and official seal this 15th day of May, A. D. 1889.

[COURT SEAL.]

J. L. BYRAM,
Clerk of Dist. Court.

8 EXHIBIT B.

THE STATE OF MINNESOTA, Plaintiff,
vs.
CLIFTON HOLDEN, Defendant.

We, the jury in the above entitled action, find the defendant, Clifton Holden, guilty of murder in the first degree, as charged in the indictment.

Dated this 28th day of May, 1889.

S. W. HUBBARD, *Foreman.*

9 EXHIBIT C.

The District Court for the County of Redwood and State of Minnesota.

THE STATE OF MINNESOTA
against
CLIFTON HOLDEN.

The above-named defendant having been accused by the grand jury of said county, by their indictment bearing date the 14th day of May, 1889, and duly presented to the court and filed with the clerk on the 15th day of May, 1889, of the crime of murder in the first degree, and the jury, duly impaneled and sworn to try said cause, having on the 28th day of May, 1889, returned a verdict that the defendant, Clifton Holden, is guilty of the crime of murder in the first degree, as charged in said indictment: Now, therefore, it is

considered and adjudged by the court that you, the said Clifton Holden, are convicted of the crime of murder in the first degree, as charged in said indictment; and it is further considered and adjudged by the court that as a punishment for the crime of murder in the first degree, of which you have been convicted, you, the said Clifton Holden, be taken hence to the common jail of Brown county (there being no jail in Redwood county) and there confined, and that thereafter and after the lapse of the period of three calendar months from this day, and at a time to be fixed by the Governor of the State of Minnesota and designated by his warrant, you, the said Clifton Holden, be taken to the place of execution to be selected by the sheriff of the county of Redwood, within said county of Redwood, and there hanged by the neck until you are dead.

STATE OF MINNESOTA, } ss:
County of Redwood, }

I, J. L. Byram, clerk of the district court for the 9th judicial district, county and State aforesaid, do hereby certify that the foregoing sentence is a true copy of the original sentence and indorsement thereon of Clifton Holden in the aforesaid and above-entitled action as on file in this office. Sentence filed February 18th, 1890.

J. L. BYRAM,
Clerk of the District Court, 9th Judicial District,
Redwood County, Minn.,

[Seal District Court.]

By EDWARD MARCH, *Dep'y.*

EXHIBIT E.

Chapter 20.

An act providing the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect, and declaring a violation of any of the provisions of this act to be a misdemeanor.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. The mode of inflicting the punishment of death shall in all cases be hanging by the neck until the person is dead.

SEC. 2. Whenever the punishment of death is inflicted upon any convict in obedience to a warrant from the Governor of the State the sheriff of the county shall be present at the execution, unless prevented by sickness or other casualty, and he may have such military guard as he may think proper. He shall return the warrant with a statement under his hand of doings thereon as soon as may be after the said execution to the Governor, and shall also file in the clerk's office of the court where the conviction was had an attested copy of the warrant and statement aforesaid, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence.

11 SEC. 3. The warrant of execution shall be executed before the hour of sunrise of the day designated in the warrant and within the walls of the jail in all cases where the jail is so constructed that it can be conveniently done therein, but when the jail is not so constructed the warrant shall be executed within an enclosure which shall be higher than the gallows and shall exclude the view of persons outside, and which shall be prepared for that purpose, under the direction of the sheriff, in the immediate vicinity of the jail, or, if there be no jail in the county, at some convenient place at the county-seat, to be selected by the sheriff.

SEC. 4. After the issue of the warrant for execution by the Governor the prisoner shall be kept in solitary confinement, and the following persons shall be allowed to visit him, but none other, viz: The sheriff and his deputies, the prisoner's counsel, any priest or clergyman the prisoner may select, and the members of his immediate family.

SEC. 5. Besides the sheriff and his assistants the following persons may be present at the execution, but none other: The clergyman or priest in attendance upon the prisoner and such other persons as the prisoner may designate, not exceeding three (3) in number; a physician or surgeon, to be selected by the sheriff, and such other persons as the sheriff may designate, not exceeding six (6) in number, but no person so admitted shall be a newspaper reporter or representative. No account of the details of such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper.

SEC. 6. Any person who shall violate or omit to comply with any of the provisions of this act shall be guilty of a misdemeanor.

SEC. 7. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

SEC. 8. This act shall take effect and be in force from and after its passage.

Approved April 24, 1889.

12 EXHIBIT D.

STATE OF MINNESOTA,)
Executive Department.)

William R. Merriam, Governor of the State of Minnesota, to C. W. Mead, sheriff of the county of Redwood, in the State of Minnesota, sends greeting:

Whereas, in a certain criminal action in the district court of the ninth judicial district of the State of Minnesota, held in and for the county of Redwood, in said State, said cause being entitled "The State of Minnesota, plaintiff, *vs.* Clifton Holden, defendant," a copy of the record in which said cause is hereto annexed, judgment was, on the 18th day of February, A. D. 1890, rendered and sentence pronounced upon the defendant, Clifton Holden, in said cause, to wit:

"It is considered and adjudged that you, Clifton Holden, as punishment for the crime of murder in the first degree, of which you have been convicted, be taken hence to the common jail of Brown county (there being no jail in Redwood county) and there confined, and that thereafter and after the lapse of three (3) calendar months from this day, and at a time to be fixed by the Governor of the State of Minnesota and designated by his warrant, you be taken to the place of execution and there hanged by the neck until you are dead:"

Now, therefore, you are hereby commanded and required to cause execution of the judgment and sentence of the law to be done upon the said Clifton Holden upon Friday, the twenty-seventh (27th) day of June, in the year of our Lord one thousand eight hundred and ninety, before the hour of sunrise on said day last above named, at a place in said county of Redwood to be selected by you, conformably with the provisions of section three (3) of an act entitled "An act providing for the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect,
13 and declaring a violation of any of the provisions of this act to be a misdemeanor," approved April 24th, A. D. 1889.

Given under my hand and the great seal of the State
Great Seal. this twenty-first (21st) day of May, A. D. one thousand eight hundred and ninety.

W. R. MERRIAM,
Governor of Minnesota.

Attest: H. MATTSON,
Secretary of State.

14 And thereupon, upon said petition, the following order was made, to wit:

In the Circuit Court of the United States, District of Minnesota.

In the Matter of the Petition of CLIFTON HOLDEN for a Writ of *Habeas Corpus.*

The petition of Clifton Holden for a writ of *habeas corpus* having been presented to this court, together with the exhibits thereto attached, and the same having been read and considered by the court:

Now, on motion of Chas. C. Willson, Esq., attorney for said petitioner, it is ordered and the court now here does order that the writ prayed for be issued out of and under the seal of this court, directed to John B. Schmid and C. W. Mead, mentioned in said petition, commanding them to have the body of Clifton Holden, together with the time and cause of his imprisonment, before the circuit court of the United States for the district of Minnesota, at a term thereof now in session at the court-house of the United States, in the city of St. Paul, in said district, on the 24th day of June, A. D. 1890, at 10 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Clifton Holden.

Dated June 19th, 1890.

R. R. NELSON, *Judge.*

15 Thereupon and pursuant to said order a writ of *habeas corpus* was duly issued out of said court, under the seal thereof, duly tested, in the words and figures following, to wit:

The President of the United States of America to John B. Schmid, sheriff of the county of Brown, and C. W. Mead, sheriff of the county of Redwood, in the State of Minnesota, Greeting:

You are hereby commanded that you have the body of Clifton Holden, by you imprisoned and detained and now in your custody, as it is said, together with the time and cause of such imprisonment, under safe and secure conduct, before the circuit court of the United States for the district of Minnesota, in the eighth circuit, to be held before the judge of said court, at the court-house of the United States, in the city of St. Paul, in said district, on the 24th day of June, A. D. 1890, at 10 o'clock in the forenoon of the same day, to do and receive what shall then and there be considered concerning the said Clifton Holden, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 19th day of June, A. D. 1890, and the seal of said circuit court.

OSCAR B. HILLIS,
Clerk of said Court.

[SEAL.]

CHARLES C. WILLSON,
Attorney for Petitioner, Rochester, Minn.

16 And afterwards, to wit, on the 24th day of June, A. D. 1890, the following return was filed, viz:

In Circuit Court of the United States, District of Minnesota.

In Re Petition of CLIFTON HOLDEN for Writ of *Habeas Corpus*.

To the honorable the circuit court of the United States for the district of Minnesota:

In the above-entitled proceeding John B. Schmid, sheriff of the county of Brown, and C. W. Mead, sheriff of the county of Redwood, in the State of Minnesota, for their return to the writ of *habeas corpus* heretofore issued in said proceeding respectfully show to this court that on the twenty-third (23d) day of May, A. D. 1889, the said Clifton Holden, mentioned in said writ, was brought to trial in the district court of Redwood county, in the State of Minnesota, upon an indictment for the crime of murder in the first degree, being therein charged with having feloniously killed one Frank Dodge on the twenty-third (23d) day of November, A. D. 1888, in said county of Redwood and State of Minnesota.

That upon said trial thereafter, to wit, on the twenty-eighth (28th) day of May, A. D. 1889, the jury impanelled to try said cause rendered a verdict wherein and whereby they found the said Clifton Holden guilty of the crime of murder in the first degree, as charged in said indictment; that afterwards, to wit, on the 18th day of Feb-

ruary, A. D. 1890, the said district court in and for said Redwood county rendered judgment adjudging said Clifton Holden guilty of murder in the first degree, as charged in said indictment, and adjudging that said Clifton Holden, as punishment for said crime, be taken to the common jail of Brown county, in said State, and there confined, and that thereafter and after a lapse of three calendar months from the date of said judgment and at a time to be fixed by the Governor of said State of Minnesota, designated by his warrant, the said Clifton Holden should be taken to a place of execution, to be selected by the sheriff of the county of Redwood, within said county of Redwood, and there hanged by the neck until dead; a copy of which said judgment and sentence appears as Exhibit "C," attached to the petition herein.

Your respondents further show that there was at the time of imposing said sentence no suitable jail in the county of Redwood, and that section two hundred and three (203) of chapter eight (8) of the General Statutes of Minnesota of 1878 provides as follows:

"The sheriff shall receive and safely keep in prison all persons legally committed thereto, and shall not let out of prison any
17 person so in his custody, unless discharged by due course of law, under penalty of being punished by fine and imprisonment: Provided that if there is no jail for the confinement of prisoners in the county or the jail is insufficient the sheriff, with the approbation of the judge of the district court, shall employ such means as may be necessary for the safe keeping of all prisoners committed to his custody."

And that section nine (9) of chapter one hundred and eighteen (118) of said General Statutes of Minnesota of 1878 provides as follows:

SEC. 9. Whenever it appears to the court, at the time of passing sentence upon any convict who is to be punished by confinement in the State prison or county jail, that there is no jail in the county in which the offense was committed suitable for the confinement of such convict, the court may order the sentence to be executed in any county in this State in which there is a jail suited to that purpose; and the expense of supporting such convict shall be borne, if such convict was sentenced to imprisonment in the county jail, by the county in which the offense was committed.

That thereafter, to wit, on the 21st day of May, A. D. 1890, William R. Merriam, then and there being the Governor of the State of Minnesota, issued to the sheriff of the said Redwood county his warrant directing the execution of the said Clifton Holden on the 27th day of June, A. D. 1890, pursuant to said judgment and sentence, and requiring the said sheriff of said Redwood county to cause execution of said judgment and sentence to be done upon the said Clifton Holden; a copy of which said warrant appears as Exhibit "D," attached to the petition herein.

And your respondents further show that, there being no jail in the said county of Redwood, said Clifton Holden was, as directed in said judgment and sentence, placed in confinement in the common jail in the county of Brown, the said common jail of Brown county being

suitable therefor; that said Clifton Holden was so confined in the jail of Brown county prior to the date of the issuance of said war-
18 rant by the Governor of the State of Minnesota, to wit, prior to the 21st day of May, A. D. 1890, and has ever since continuously been confined in the said common jail of said county of Brown, in said State of Minnesota, and in the custody of the respondent John B. Schmid, sheriff of the county of Brown.

Your respondents further show that section one hundred and fifty-six (156) of the Penal Code of the State of Minnesota prescribes the punishment for murder in the first degree in words and terms as follows:

SEC. 156. Murder in the first degree is punishable by death: Provided that if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which the penalty of death should be imposed, the punishment shall be imprisonment for life in the State prison.

And that no certificate was made by the court certifying its opinion that by reason of exceptional circumstances the case was one in which the penalty of death should be imposed.

Your respondents further show that section two (2) of chapter ninety-four (94) of the General Statutes of the State of Minnesota of 1878, prescribing the punishment for murder, is in words and terms as follows, so far as applicable to the case at bar:

SEC. 2. Such killing, when perpetrated with a premeditated design to effect the death of the person killed or any human being, shall be murder in the first degree, and whoever is convicted of the same shall suffer the penalty of death; but any person convicted of any capital crime shall be kept in solitary confinement for a period of not less than one month nor more than six months, in the discretion of the judge before whom the conviction is had; at the expiration of which time it shall be the duty of the Governor to issue his warrant of execution.

And these respondents show that said section has never been repealed so far as it applies to the authority of the Governor to issue his warrant of execution.

19 And your respondents further show that section three of chapter one hundred and eighteen (118) of the General Statutes of the State of Minnesota of 1878 is in words and terms as follows:

SEC. 3. When any person is convicted of any crime for which sentence of death is awarded against him the clerk of the court, as soon as may be, shall make out and deliver to the sheriff of the county a certified copy of the whole record of the conviction and sentence, and the sheriff shall forthwith transmit the same to the Governor, and the sentence of death shall not be executed upon such convict until a warrant is issued by the Governor under the seal of the State, with a copy of the record thereto annexed, commanding the sheriff to cause the execution to be done; and the sheriff shall thereupon cause to be executed the judgment and sentence of the law upon such convict.

And these respondents further show that section six (6) of chapter

118 of the General Statutes of the State of Minnesota of 1878 is in words and terms as follows:

SEC. 6. In any case of legal conviction where no punishment is provided by statute the court shall award such sentence as is according to the degree and aggravation of the offense, not cruel or unusual nor repugnant to the constitutional rights of the party.

And these respondents further show that section eleven (11) of said chapter 118 of the General Statutes of the State of Minnesota of 1878 is in words and terms as follows:

SEC. 11. The punishment of death shall, in all cases, be inflicted by hanging the convict by the neck until he is dead; and the sentence shall, at the time directed by the warrant, be executed at such place within the county as the sheriff shall select.

And that both of said sections are now in full force and operation as a part of the laws of the State of Minnesota.

And these respondents further show that section three (3) of
20 chapter four (4) of the General Statutes of the State of Minnesota of 1878 is in words and terms as follows:

SEC. 3. When a law is repealed which repealed a former law the former law shall not thereby be revived unless it is so especially provided, nor shall such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the law repealed.

And that said section is in full force and operation and a part of the laws of the State of Minnesota.

And these respondents show that all and singular the confinement of the said Clifton Holden and his custody by the said John B. Schmid and C. W. Mead is pursuant to such conviction and the judgment and sentence of the court thereon, said warrant and the several provisions of the law hereinbefore recited.

And your respondents, for further return to such writ, deny that the said Clifton Holden ever has been or now is kept in solitary confinement, and allege that the said Clifton Holden is more particularly in the custody of the respondent John B. Schmid, and that during all the time of his confinement in the common jail of the county of Brown prior to the issuance of said warrant, to wit, prior to the 21st day of May, A. D. 1890, he has simply been confined in said jail as the other prisoners in said jail are confined; that he has had the liberty of said jail at all reasonable times in common with the other prisoners of said jail, and that all said time he has had the liberty of said jail at all reasonable times in common with the other prisoners of said jail, and that all of said time he has had the same rights and liberties as the other prisoners in said jail, whether confined for capital offenses or otherwise, and in no manner has his confinement during any of said time nor is it now different in any respect from that of any and all the other prisoners confined in said jail; that during all of said time since said Clifton
Holden has been confined in said jail he has been permitted
21 to mingle with the other prisoners during the daytime as freely as any person therein confined, participating with them in their daily exercises and taking his meals in common with the

other prisoners; that he has been permitted at all reasonable hours to receive visits from his relatives and his counsel, and that no restriction has been placed upon said Clifton Holden receiving visitors other than his relatives consistent with a due regard for prison discipline; and in further proof thereof respondents tender the annexed affidavit of John H. Schapakahm, hereto attached, marked Exhibit "A."

And your respondents deny that the said Clifton Holden is restricted of his liberty, in violation of the laws and constitutional provisions of the State of Minnesota and of the United States of America.

Your respondents further show that in obedience to said writ they hold the body of said Clifton Holden to do and receive what shall be considered and determined by your honorable court.

Wherefore these respondents respectfully pray that said writ be quashed and they be hence dismissed.

JOHN B. SCHMID,
C. W. MEAD,
Respondents.

M. M. MADIGAN,
County Attorney Redwood Co.
MOSES E. CLAPP,
Attorney General State of Minnesota,
Att'ys for Respondents.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

John B. Schmid, being by me first duly sworn, doth depose and say that he is one of the respondents named in the writ of *habeas*
22 *corpus* in the above-entitled proceeding; that he has read the foregoing return, and that the contents of said return are true to deponent's own knowledge.

JOHN B. SCHMID.

Subscribed and sworn to before me this 21st day of June, A. D. 1890.

[Seal Supreme Court.]

J. L. HELM,
Deputy Clerk, Supreme Court.

STATE OF MINNESOTA, } ss:
County of Redwood, }

C. W. Mead, being by me first duly sworn, doth depose and say that he is one of the respondents named in the writ of *habeas corpus* in the above-entitled proceeding; that he has read the foregoing return, and that the contents of said return are true to deponent's own knowledge.

C. W. MEAD.

Subscribed and sworn to before me this 21 day of June, A. D. 1890.

[NOTARIAL SEAL.]

M. M. MADIGAN,
Notary Public, Redwood County, Minn.

EXHIBIT A.

STATE OF MINNESOTA, } ss:
County of Brown, }

John H. Schapakahm, being by me first duly sworn, doth depose and say that he is now and for the past five years has been the duly appointed jailer of Brown county and State of Minnesota; that
23 he is acquainted with one Clifton Holden, a prisoner confined in the common jail of said county and now awaiting execution for the murder of one Frank Dodge; that, as such jailer, he, said affiant, has had the care and custody of said Holden during all the time of his confinement in said jail, and particularly so since the issuance of the warrant by the Governor of said State for said Holden's execution; that during all the time said Holden has been confined in said jail he has enjoyed the same liberties extended to other prisoners confined therein; that at no time has he been so confined therein that he could not converse freely with any and all persons in said jail, whether prisoners or otherwise; that during all of said time he has enjoyed daily exercise of from three to five hours with his fellow-prisoners in the corridor of said jail, and has daily sat at table with them while taking their meals in common; that during all of said time he has been allowed to see and converse with all persons who have applied for permission therefor, and that no person has ever been denied admission to him during his said confinement; that said prisoner has been visited since the date of the issuance of said warrant by his mother, brother, and counsel, and he has in each and every instance enjoyed unrestricted opportunities to converse with the same.

And affiant further says that the said Clifton Holden has not at any time since his confinement in said jail been kept in solitary confinement.

JOHN H. SCHAPAKAHM.

Subscribed and sworn to before me this 24th day of June, A. D. 1890.

C. A. HAGBERG,
[SEAL.] *Notary Public.*

24 In the Circuit Court of the United States, District of Minnesota.

In the Matter of the Petition of CLIFTON HOLDEN for Writ of *Habeas Corpus.*

On this 24th day of June, A. D. 1890, comes the petitioner, Clifton Holden, by Chas. C. Willson, his attorney, and for answer to the return of John B. Schmid and C. W. Mead, respondents herein, denies that sec. 2 of chap. 94 of the General Laws of the State of Minnesota, set out in said return, is still in force. He alleges that the same was repealed by chap. 88 of the Laws of 1868, and again by

chap. 122 of the Laws of 1883, and again by the Penal Code of 1885, sec. 541, acts of the Legislature of the State of Minnesota, and to which reference is made and the provisions thereof incorporated in this reply as fully as if the text thereof was literally set forth herein.

The petitioner further shows to this honorable court that sec. 6 of chap. 118 of the General Statutes of the State of Minnesota of 1878 has no application and does not refer to the case at bar, and he alleges that sec. 11 of chap. 118 of said statutes is repealed by the act of 1889, a copy of which is attached to his petition.

The petitioner further shows to the court that the supreme court of the State of Minnesota has heretofore determined that sec. 3 of chap. 4 of the General Statutes aforesaid does not apply to repeals by implication or those effected by the provisions of an act being inconsistent with the provisions of a former act, in Miller *vs.* Miller, 39 Minn. R., 376, and have held this statute inapplicable in a case like the present.

State *vs.* McDonald, 20 Minn. R., 136.

The petitioner respectfully denies the allegations of the said
25 return regarding the manner of his confinement, and alleges that he has been kept in solitary confinement, as alleged in his said petition.

Wherefore this petitioner prays this honorable court to inquire into the cause of his said imprisonment and that he be discharged therefrom.

CHAS. C. WILLSON,
Attorney for Petitioner.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Chas. C. Willson, of the city of Rochester, in said State, being duly sworn, says he is the attorney for the said Clifton Holden above named; that said Clifton Holden is now absent from said county and for that reason cannot verify this pleading; that deponent has heard the said pleading read and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

CHAS. C. WILLSON.

Subscribed and sworn to before me this 24th day of June, 1890.
T. S. THOMPKINS.
[NOTARY SEAL.] *Notary Public, Ramsey County, Minn.*

26 Thereupon and on the same day the following stipulation was made and filed in said cause.

In the Circuit Court of the United States, District of Minnesota.

In the Matter of the Petition of CLIFTON HOLDEN for a Writ of *Habeas Corpus.*

It is stipulated by and between the attorney for the petitioner,

Clifton Holden, on the one part, and the attorney general of the State of Minnesota, on the other, that any and all of the statutes of the State of Minnesota pertinent to the matters in issue upon the petition, return, and traverse in this proceeding may be read and referred to upon the argument or consideration of the issues therein as fully from the printed copies in ordinary use in said district as if specially referred to or set out in the said pleadings and proven in due form before said court.

Dated June 24th, 1890.

MOSES E. CLAPP,
Att'y Gen. State of Minnesota.
CHAS. C. WILLSON,
Att'y for Petitioner.

27 And on the same day the following further stipulation was made and filed in said cause, to wit:

In the Circuit Court of the United States, District of Minnesota.

In the Matter of the Petition of CLIFTON HOLDEN for a Writ of *Habeas Corpus.*

And now, on this 24th day of June, A. D. 1890, comes the relator, Clifton Holden, by his attorney, Charles C. Willson, and also come the respondents, John B. Schmid and C. W. Mead, by Moses E. Clapp, Esq., attorney general of the State of Minnesota, in their behalf, and in open court it is stipulated and agreed between the respective parties that the personal presence of the said Clifton Holden is waived and that an order be entered that his presence is waived without prejudice in any manner of his rights.

And it is further stipulated in open court by the said parties that the copy indictment marked Exhibit "A" and of the verdict marked Exhibit "B" and of the statute of 1889 marked Exhibit "E," attached to the petition for the writ of *habeas corpus*, are true and correct copies of the said originals, and that the return in this case be so amended as to admit these facts.

MOSES E. CLAPP,
Att'y Gen'l State of Minn.
CHAS. C. WILLSON,
Attorney for the Petitioner.

Thereupon, on the same day, the following proceeding, among others, was had, to wit:

28 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890, June 24th, 1890.

In the Matter of the Petition of CLIFTON HOLDEN for a Writ of *Habeas Corpus.* Criminal No., 94.

And now, on this 24th day of June, A. D. 1890, come the respondents, John B. Schmid and C. W. Mead, and file their return to the

writ of *habeas corpus* heretofore issued in this matter, and also a stipulation waiving the personal presence in court of the said Clifton Holden and for an amendment of said return; the said petitioner also filed his reply and traverse of the said return, and thereupon it is ordered that the hearing upon the said petition, writ, return, and other papers filed herein be adjourned to and had on Wednesday, July 2nd, A. D. 1890, at 10 o'clock in the forenoon, at the courthouse of the United States in the city of St. Paul, in said district, and pursuant to a stipulation made and entered into in open court by the attorney general for the State of Minnesota and Charles C. Willson, petitioner's attorney, it is ordered that in the meantime all proceedings under the warrant of his excellency the Governor of Minnesota be stayed and the said Clifton Holden, petitioner, be safely and securely held and kept until further order of this court in the premises.

R. R. NELSON, *Judge.*

T. M., vol. 2, page 37.

29 And afterwards, to wit, on the 2nd day of July, A. D. 1890, the following proceeding, among others, was had, to wit:

30 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890, July 2nd, 1890.

STATE OF MINNESOTA *vs.* CLIFTON HOLDEN. } Criminal No., 94.

In the Matter of the Petition of CLIFTON HOLDEN for a Writ of *Habeas Corpus.*

A writ of *habeas corpus* having been heretofore issued by this court upon the petition of Clifton Holden, directed to John B. Schmid and C. W. Mead, sheriffs of Brown and Redwood counties, in the State of Minnesota:

Now, said sheriffs having heretofore filed the writ with their returns attached thereto, Charles C. Willson is heard on behalf of the prisoner and Moses A. Clapp on behalf of the State of Minnesota, and the same is duly submitted and by the court taken under advisement.

T. M., vol. 2, page 57.

31 And afterwards, to wit, on July 3rd, A. D. 1890, the following proceeding, among others, was had, to wit:

32 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890, July 3rd, 1890.

STATE OF MINNESOTA
vs.
CLIFTON HOLDEN. } Criminal No., 94.

In the Matter of the Petition of Clifton Holden for a Writ of *Habeas Corpus.*

On consideration of the application for the discharge of the petitioner, Clifton Holden, the writ of *habeas corpus* directing John B. Schmid and C. W. Mead, sheriffs of the counties of Brown and Redwood, Minnesota, respectively, to produce the body of the said Clifton Holden before this court and to certify the cause of his detention and imprisonment having been duly issued, and the said John B. Schmid and C. W. Mead, sheriffs as aforesaid, having certified that said Clifton Holden is detained in their custody under and by virtue of a sentence of the State district court of the county of Redwood and the warrant of his excellency the Governor of the State of Minnesota, and the cause of said imprisonment having been duly inquired into by this court upon the return of said writ of *habeas corpus* heretofore issued herein, and counsel having been heard and due consideration having been had—

It is now here ordered by this court that the imprisonment of said Clifton Holden under said judgment of said State court and said warrant of his excellency the Governor of the State of Minnesota is not contrary to law or in violation of the Constitution of the United States, and that the said Clifton Holden is not entitled to his liberty.

Whereupon it is ordered that said application of said
33 Clifton Holden for his discharge be, and the same is hereby, denied.

Dated July 3rd, 1890.

T. M., vol. 2, pages 61 and 62.

34 And afterwards, to wit, on the 9th day of July, the following petition for an appeal was filed in said cause, to wit:

35 In the Circuit Court of the United States for the District of Minnesota.

In the Matter of the Petition of CLIFTON HOLDEN for His Discharge on *Habeas Corpus.*

Application for discharge having been denied, now comes Clifton Holden, petitioner above named, by Charles C. Willson, his attorney, and in open court prays an appeal to the Supreme Court of the United States from the judgment and determination of this court denying his petition for his discharge.

Dated St. Paul, July 9th, 1890.

CHARLES C. WILLSON,
Attorney for Petitioner.

(Endorsed :) Filed July 9th, 1890. Oscar B. Hillis, clerk.

36 And afterwards, to wit, on the same day, the following further proceedings were had, to wit :

37 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890, July 9th, 1890.

Page 77, vol. 2.

STATE OF MINNESOTA
vs.
CLIFTON HOLDEN. } Criminal No., 94.

In the Matter of the Petition of CLIFTON HOLDEN for a Writ of *Habeas Corpus.*

The application of Clifton Holden for his discharge having been refused by this court, and he having thereupon prayed this day in open court that an appeal be allowed to the Supreme Court of the United States from said judgment and determination of this court—

On motion of Charles C. Willson, Esq., attorney for the petitioner, and after hearing Moses E. Clapp, Esq., attorney general of the State of Minnesota, it is ordered that such appeal be, and the same is hereby, allowed without bond or security, and the clerk of this court is directed to send up to the Supreme Court of the United States a transcript of the petition, writ of *habeas corpus*, return thereto, and of all other records, files, minutes, and proceedings in this matter.

Dated July 9th, 1890.

38 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890, July 9th, 1890.

Page 79, vol. 2.

STATE OF MINNESOTA
vs.
CLIFTON HOLDEN. } Criminal No., 94.

In the Matter of the Petition of CLIFTON HOLDEN for a Writ of *Habeas Corpus.*

The application of Clifton Holden for his discharge having been heard, considered, and denied, and he having taken an appeal thereupon to the Supreme Court, and the appeal having been duly allowed and perfected, now, on motion of Charles C. Willson, Esq., of counsel for the petitioner, and after hearing Hon. Moses E. Clapp, attorney general of the State of Minnesota, consenting thereto, it is ordered that said Clifton Holden be committed to the custody of J. J. Randall, Esq., warden of the State's prison at Stillwater, in

said State, to be there safely kept and detained pending said appeal and until the further order of this court.

Dated July 9th, 1890.

39 And on the same day the following notice of an appeal was filed in the clerk's office of said court, to wit:

40 In the Circuit Court of the United States for the District of Minnesota.

In the Matter of the Petition of CLIFTON HOLDEN for His Discharge on *Habeas Corpus*.

Please take notice that Clifton Holden, the petitioner above named, appeals to the Supreme Court of the United States of America from the judgment and determination of the said circuit court, made and entered July 3rd, 1890, in the above-entitled proceedings, denying his petition for discharge from imprisonment.

Dated July 9th, 1890.

CHARLES C. WILLSON,
Attorney for Petitioner, Rochester, Minn.

To Hon. Moses E. Clapp, attorney general for the State of Minnesota, St. Paul, Minn.

Due service of the above notice is hereby admitted at St. Paul, Minn., this July 9th, 1890.

MOSES E. CLAPP,
Attorney General, State of Minnesota.

(Endorsed:) Filed July 9th, 1890. Oscar B. Hillis, clerk.

41 And on the same day the following stipulation was filed in said cause, to wit:

42 In the Circuit Court of the United States for the District of Minnesota.

In the Matter of the Petition of CLIFTON HOLDEN for His Discharge on *Habeas Corpus*.

It is hereby stipulated by the attorneys for the petitioner and for the State of Minnesota in the above-entitled proceeding that the notice of appeal by the said petitioner, Clifton Holden, from the order and final determination of this court refusing his application for discharge has been this day, at St. Paul, in said district, duly and properly served, and that citation and all security upon such appeal be, and they are hereby, waived.

Dated July 9th, 1890.

CHARLES C. WILLSON,
Attorney for Petitioner.
MOSES E. CLAPP,
Attorney for Respondents.

(Endorsed:) Filed July 9th, 1890. Oscar B. Hillis, clerk.

43 In the Circuit Court of the United States for the District of Minnesota, in the Eighth Circuit.

In Re CLIFTON HOLDEN.

Section 156 of the Penal Code of the State of Minnesota prescribes the punishment for murder, which, by the terms of said section, is made punishable by death. Section two of chapter ninety-four (94) of the General Statutes of the State of Minnesota of 1878, among other things, authorized the Governor to issue his warrant of execution at the expiration of the time when the person shall be imprisoned upon conviction.

Said chapter ninety-four (94) was repealed by the Penal Code so far as it defines a crime or imposes a punishment (section 541 of the Penal Code); but this did not repeal that portion of the statute (section 2) which gives the Governor authority to issue his warrant. The supreme court of the State of Minnesota expressed a doubt as to whether this provision was repealed in the case of State *vs.* Holong, 38 Minn., 368. That that portion of section two (2) of chapter ninety-four (94) conferring authority upon the Governor to issue his warrant of execution remains unrepealed in view of the language of section 541 is too plain to admit of argument.

Section three (3) of chapter 118 of the Revised Statutes of the State of Minnesota of 1878 authorizes the Governor to issue his warrant for the execution of the convicted. See State against Holong, 38 Minn., 368, and State *vs.* Barrett, 40th Minn., 65 (see bottom page 75). Section 11 of said chapter 198 prescribes the manner in
44 which the penalty of death shall be inflicted, to wit, by hanging by the neck until dead and at the time directed by the warrant. Said chapter 118 is now in full force and effect and confers full authority upon the executive to issue a warrant designating the time and place of execution. It is claimed that chapter 20 of the General Laws of the State of Minnesota for the year 1889 is *ex post facto* as to the petitioner, because it prescribes solitary confinement between the date of the issuance of the warrant and the execution thereof.

It will be seen that the law of 1889 does not in any manner affect the authority of the Governor to issue his warrant, nor does it require that additional punishment shall be imposed by virtue of any recital in the warrant, but simply by force of the law itself.

It is contended by the respondent that although said chapter 20 contains a repealing clause, it does not repeal the law existing at the time the offense was committed so far as the same is applicable to the petitioner. Section three (3) of chapter four (4) of the General Statutes of the State of Minnesota of 1878 contains this provision: "Nor shall such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under and by virtue of the law repealed." And respondent contends that this amounts to a saving clause which should be read in conjunction with said chapter 20, and that the law in force at the time the act complained of was committed remains unaffected by the repealing clause in said chapter 20.

45 Counsel for petitioner, in opposition to this proposition, relies upon the case of State of Minnesota *vs.* McDonald, 20 Minn., 136. That case really involved the question of whether a certain act was *ex post facto* as to the defendant.

It does not appear from the case that the attention of the court was called to said section three (3) of chapter four (4) of the General Statutes of the State of Minnesota of 1878, which was then found in section three (3) of chapter four (4) of the General Statutes of the State of Minnesota, revision of 1866. It is true, the court say, that a statute repealed is no longer in force, but this point does not appear to have been considered nor does it appear that the attention of the court was called to the saving clause under consideration, and in view of the many decisions holding to the contrary it is submitted that the dictum in the decision cited is not as to this particular point decisive. Another case relied upon by counsel of the petitioner is the case of Miller *vs.* Miller, 39 Minn., 376, but it will be seen upon investigation that this case has no reference whatever to the provision under consideration. Said section three (3) of chapter four (4) of the General Statutes of 1878 contains two provisions:

First. "Whenever a law is repealed which repealed a former law the former law shall not thereby be revived, unless it is so specially provided."

Second. "Nor shall such repeal affect any right which accrued, any duty imposed," and so forth.

In Miller *vs.* Miller the general statutes provided that the summons might be served by any one not a party to the action. By a special law passed in 1877 it was enacted that summons to be served in Ramsey county should be served by a sheriff

46 or one of his deputies. This law was repealed in 1881, and, under a familiar rule, where a special law is passed taking any subject out of the provisions of a general law upon the repeal of such special law the subject thereof at once passes under the provisions of the general law, and it was upon this principle that the court decided the case, and the portion of said section three quoted is that portion of the section which relates to the effect of repealing a repealing law, and the court, with reference to that, say that they doubt whether it applies to a repeal by implication. Opposed to the dictum of the court in State *vs.* McDonald, 20 Minn., 136, numerous authorities might be cited, but we think it sufficient to cite the case of United States *vs.* Reisinger, 128 U. S., 398, where the court say that the provisions of the statute providing that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, excepts from the effect of the repeal of a statute all offenses committed before their passage.

See also Commonwealth *vs.* Desmond, 123 Mass., 407; McCuen *vs.* State, 19 Ark., 634; Volmer *vs.* State, 34 Ark., 487; Lakeman *vs.* Moore, 32 N. H., 410.

The respondent contends, therefore, that chapter 20 of the General Laws of 1889, notwithstanding its repealing clause, leaves in force

all laws which were in force at the time the offense was committed so far as they relate to the petitioner, and that he could be convicted, sentenced, and executed under the laws in force prior
47 to the passage of said chapter 20 of the General Laws of the State of Minnesota of 1889, and the laws in force prior to that time furnish complete and full provisions for the trial, conviction, and execution of the person charged with the offense of murder in the first degree, and it will be worth considering that the Federal statutes and the statutes of many of the States contain provisions similar to that found in section three (3) of chapter four (4) of the General Statutes of Minnesota of 1878, and the manifest purpose of this is to guard against any oversight in omitting a saving clause in laws repealing other laws under which rights of action have accrued or penalties have been incurred; but while there is some variance in the language employed, yet they all require substantially the same construction and will be found to accord with the Federal statute of the same nature. It may be contended by counsel for petitioner that the peculiar phraseology of the second subdivision of section three of chapter 4 of the General Statutes of the State of Minnesota of 1878 limits the effect thereof to acts which repeal repealing acts. The absurdity of this contention is too plain to warrant this discussion. It would render meaningless the law and be of no avail whatever, and it can only be pretended that the provision applies to any law which repeals an act under which any right of action had accrued or any penalty had been incurred.

Before passing to the consideration of what we understand the second point raised by counsel to be, we desire to observe that, as this case stands, the petitioner has not been subjected to any solitary confinement whatever under the provisions of chapter 20 of the General Laws of 1889 for the State of Minnesota.

48 It is true that the Governor's warrant requires that he shall be executed in conformity with the provisions of said act, but the act itself does not prescribe any additional requirement of the warrant, and as to the petitioner that portion of the warrant which requires him to be executed in conformity with the act of 1889 is mere surplusage. That portion of the warrant effective in this case is the recital of the conviction and sentence and the command to the sheriff to cause execution of the judgment and sentence of the law to be done upon said petitioner at the time and place therein designated.

We understand counsel for petitioner to insist that the determination as to the time of the execution of the judgment is a judicial act which cannot be performed by the executive, owing to the constitutional provision which divides the powers of the government into three classes, judicial, executive, and legislative. In answer to this we submit that during a long term of years and in many States in the Union it has been customary for the Governor under proper provisions of law to, by his warrant, fix the time of the execution; generally not until after the specified time fixed by the court has elapsed, and the act of fixing the time is in no sense a judicial act. It is no part of the judgment, although sometimes the power is

vested in the court, to be exercised by the issuance of the warrant, fixing the time and place, which is usually after judgment has been entered. That the time of the execution is not an essential part of the judgment, see State *vs.* Gut., 13 Minn., 341 (Gil.); State *vs.* Cockrhan, 2 Ired., 204, where it is held that the time at which the sentence is to be carried into effect is no part of the judgment of the court.

49 See also State *vs.* Summers, 9 Nev., 269. Under the law of that State the court after judgment issues the warrant, and the court holds that fixing the time of execution is no part of the judgment, and that where it was fixed in the judgment it was to be treated as mere surplusage. In the case of Webster *vs.* Commonwealth, 5 Cushing, 386, while the direct question was not raised, yet under the law in force at that time the executive was authorized to fix the time and place of execution. The court fixed the time in the judgment, and it held that it did not vitiate the judgment.

In California the law provides that after the judgment the warrant shall be issued by the court, and if no warrant is issued within the time limited it may subsequently be issued.

People *vs.* Bonilla, 38 Cal., 699; People *vs.* Murphy, 45 Cal., 137.

In the case of Done *vs.* People, 5 Parker's Criminal Reports, 364, the court pronounces the sentence of death and imprisonment until such punishment should be inflicted upon the warrant issued by the Governor, and this action was sustained.

The fact that it is left uncertain as to when the punishment will be inflicted was commented upon in the case of People against Hartung, 22 N. Y., 95, as also in the case of *In re* Medley, and in both cases it will be seen that the consideration of this point was directed to the proposition that this was an additional punishment, and upon this ground it was held in both instances that the law was *ex post facto* as to the prisoner, but in neither case was it insisted upon that for this reason was the law itself a violation of any constitutional requirement.

Respondents contend, therefore, that it violates no constitu-
50 tional provision to authorize the Governor to fix a day of execution by his warrant, the judicial act being a determination of the prisoner's guilt and judgment of death, and that the statutes cited confer upon the Governor full authority to issue his warrant.

Respondents further contend that if it is claimed that under the constitution of Minnesota the Legislature cannot vest the Governor with authority to fix the time in which the criminal judgment can be carried into execution, for him to do so is to deprive one of a right under the constitution of the State of Minnesota, and not under the Federal Constitution; and the question, therefore, cannot properly be raised before this court upon *habeas corpus* proceedings, the law authorizing such proceedings limiting the right to cases where it is claimed the right is denied, in violation of the Federal Constitution. Commonwealth *vs.* McDonough, 95 Mass., 581, was

decided before the act of 1869, referred to in Commonwealth *vs.* Desmond, 123 Mass., 407.

51 And afterwards, to wit, on the 30th day of July, 1890, the following assignment of errors was filed, viz:

In the Circuit Court of the United States for the District of Minnesota.

In the Matter of the Petition of CLIFTON HOLDEN to be Discharged on *Habeas Corpus*.

And now comes the said Clifton Holden, by Charles C. Willson, Esq., his attorney, and files in this court an assignment of errors in the final order and judgment of said court denying his application to be discharged, as follows:

1st. The said circuit court erred in holding and adjudging that his imprisonment was not contrary to law or in violation of the Constitution of the United States.

2nd. The said circuit court erred in holding and adjudging that said Clifton Holden was not entitled to his liberty.

3rd. The said circuit court erred in denying the application of said Clifton Holden for his discharge.

4th. The said circuit court erred in holding that section three (3) of chapter four (4) of Minnesota General Statutes saved and excepted the petitioner's case out of the operation of chapter twenty (20) of the Laws of Minnesota for the year 1889.

5th. The said circuit court erred in overruling the contention of the said Clifton Holden that the Minnesota act of April 24th, A. D. 1889, adding solitary confinement to the previous punishment
52 for murder in the first degree so far altered and superseded the prior statutes that the punishment now prescribed for that crime is as to his case *ex post facto* and unconstitutional.

6th. The said circuit court erred in overruling the contention of said Clifton Holden that the judgment of the State district court that he be hanged at a time to be fixed by the Governor of Minnesota was not a valid exercise of judicial authority or due process of law thus to deprive him of life at such time as the executive should arbitrarily appoint.

Wherefore the said Clifton Holden prays that said order and judgment of said circuit court made and dated July 3rd, A. D. 1890, denying his application for discharge, may be in all things reversed and he discharged from imprisonment.

Dated July 30th, A. D. 1890.

CHAS. C. WILLSON,
Attorney for Petitioner, Rochester, Minnesota.

53 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, *ss:*

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States

that the foregoing, consisting of 52 pages numbered consecutively from one to 52, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause, wherein Clifton Holden is petitioner for a writ of *habeas corpus*, and of the whole thereof as appears from the original records and files of said court, and I do further certify and return that I have annexed to said transcript and included within said paging a copy of the original notice of appeal, together with the proof of service thereof and the stipulation concerning citation and security.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 30th day of July, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth year.

Seal U. S. Circuit Court, Dist. of Minnesota.

OSCAR B. HILLIS, *Clerk*.

[Endorsed:] United States circuit court, district of Minnesota. —— —— *vs.* —— ——. Return to Supreme Court.

Endorsed on cover: Minnesota C. C. U. S. No. 1237. Clifton Holden, appellant, *vs.* The State of Minnesota. Filed August 16, 1890.

FILED
SEP 26 1890
JAMES H. McKENNEY,
CLERK.

Supreme Court

OF THE

UNITED STATES.

NO. 1237, OCTOBER CALENDAR.

CLIFTON HOLDEN,
Petitioner and Appellant.

vs.

THE STATE OF MINNESOTA,
Respondent and Appellee.

MOTION TO ADVANCE CAUSE.

CHARLES C. WILSON, Attorney for Appellant.

MOSES E. CLAPP, Attorney for Appellee.

Supreme Court

OF THE

UNITED STATES.

CLIFTON HOLDEN,
Petitioner and Appellant.

vs.

THE STATE OF MINNESOTA,
Respondent and Appellee.

MOTION TO ADVANCE CAUSE.

Now comes the State of Minnesota, respondent in the above entitled cause, by Moses E. Clapp, Attorney General of said State, and moves that said cause be advanced upon the calendar, and assigns therefor the following reasons:

First. That said cause is a criminal case.

Second. That said cause involves matter of general public interest.

STATEMENT OF CASE.

On the 28th day of May, A. D. 1889, the above named petitioner, Clifton Holden, was convicted in the District Court of the County of Redwood, in the State of Minnesota, of the

crime of murder in the first degree, and thereupon was sentenced by the Court to be hanged, at a place in the said County of Redwood to be designated by the sheriff of said county, after the lapse of three calendar months, at a time to be fixed by the Governor of the State of Minnesota, to be designated in his warrant; and thereafter on the 21st day of May, A. D. 1890, the Governor of the State of Minnesota issued to the sheriff of said Redwood County his warrant commanding and requiring execution of the judgment and sentence aforesaid to be done upon the petitioner on the 27th day of June, A. D. 1890.

The offense, of which said petitioner was convicted, was committed on the 23d day of November, A. D. 1888; on the 24th day of April, A. D. 1889, the Legislature of the State of Minnesota passed an act known and designated as Chapter 20 of the General Laws for the State of Minnesota for the year 1889; said act, among other things, by section four (4) required that after the issuing of the warrant for execution, the prisoner shall be kept in solitary confinement.

The act referred to was passed after the offense was committed and before the Governor's warrant for the execution of the petitioner was issued. On the 19th day of June, A. D. 1890, the petitioner sued out a writ of habeas corpus from the Circuit Court of the United States for the District of Minnesota, commanding the sheriff of said Redwood County to bring the body of said Clifton Holden before said Court on the 24th day of June, A. D. 1890, to do and receive what should then be considered concerning the said Clifton Holden. Thereafter, and on the 9th day of July, A. D. 1890, upon the consideration of said application for said writ of habeas corpus, the said Court did order that the imprisonment of the petitioner, Clifton Holden, under the judgment of said Court, and the warrant of the Governor of the State of Minnesota, was not contrary to law, or in conflict with the Constitution of the United States, and that said Clifton Holden was not entitled to his liberty; and said Court did further order that the said application be denied; whereupon, judgment was duly entered in the Circuit Court for the District of Minnesota conformable to said order.

Said application for the writ of habeas corpus was based upon the following claims, as appears from the petition for said writ:

"Your petitioner respectfully shows to this Court that by the said judgment of said State Court, his life is placed at the discretion of the Executive of said State, whether he shall die in three months or three years, or in any other time. That by said judgment and said warrant your petitioner is deprived of his life without due process of law, and at the discretion of the Chief Executive of the State, in violation of the Fourteenth Amendment of the Constitution of the United States.

Your petitioner further shows that after the death of said Dodge, and before the trial of your petitioner for his murder, the Legislature of the State of Minnesota passed an act which became the law of said State on April 24th, 1889, whereby the former law for the punishment of homicide was amended, so that any person convicted of murder in the first degree instead of being hung, should be kept in solitary confinement after the issue of the warrant aforesaid, to the time of execution, and then hung by the neck until dead. Said act repealed all acts and parts of acts inconsistent with the provisions of that act. A copy of said act is hereto attached and marked "Exhibit E." and made a part hereof.

Your petitioner respectfully shows to this Court, that the former laws of said State provided execution by hanging as punishment for murder in the first degree. That said former laws are inconsistent with the provisions of this act and are thereby repealed, and that said act of April 24th, A. D. 1889, is as to the said charge against your petitioner, an *ex post facto* law and that your petitioner is in custody thereun der in violation of Article One of Section Ten of the Federal Constitution."

In opposition to the claim of the petitioner as above set forth, the respondent maintained that the laws of the State of Minnesota made ample provision for carrying into effect the sentence and judgment of the Court, and conferred ample authority upon the Executive to issue his warrant for such execution; and further, that the act of the Legislature of March 24th, 1889, did not apply to the case of the petitioner for the reason that the general statutes for the State of Minnesota contains a provision to the effect that the repealing of a law does not affect any forfeiture or penalty incurred under the law repealed; and that consequently the law in force at the time of the alleged commission of the

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Supreme Court
OF THE
UNITED STATES.

NO. 1237, CALENDAR OF 1890.

CLIFTON HOLDEN,
Petitioner and Appellant,

vs.

THE STATE OF MINNESOTA,
Respondent and Appellee.

ARGUMENT FOR APPELLANT.

CHAS. C. WILLSON,
OF COUNSEL FOR APPELLANT.
ROCHESTER, MINNESOTA.

Record and Union Printing House, Rochester, Minn.

In the Supreme Court of the United States.

In the Matter of Clifton Holden, Appellant, vs. The State of Minnesota, Respondent. No. 1237.

This appeal is taken by Clifton Holden, from the judgment of the Circuit Court of the United States for the District of Minnesota, rendered July 3d, 1890, in the proceedings had in that court upon the petition of Holden to be discharged from imprisonment.

A writ of habeas corpus was issued out of that court on his petition; a hearing was had upon the merits. His discharge was denied, and the Petitioner has appealed to this Court under U. S. Rev. Stat. Section 764, as amended by the Act of March 3d, 1885, 23 U. S. Stat. at large, Chapter 353, p. 437.

The federal question presented by this appeal is whether the Appellant Holden is restrained of his liberty in violation of Article one (1), Section ten (10) of the Constitution, whereby the States are forbidden to pass any *ex post facto* law.

On Nov. 23d, A. D. 1888, Frank Dodge came to his death from a pistol shot wound in his head, at Redwood Falls, Minnesota. On the next day Clifton Holden was arrested and charged with having feloniously effected the death of said Dodge. Holden has ever since been in jail.

On May 14th, 1889, Holden was indicted in the Minnesota State Court, for murder in the first degree;

a copy of the indictment is attached to the petition (Record, page 5). On May 23d, 1889, he was brought to trial. The evidence was wholly circumstantial, but a jury returned a verdict of guilty with a recommendation to mercy. A motion was made by the accused for a new trial, but it was denied by the State Trial Court, and on appeal to the State Supreme Court, that order was affirmed, no error having been found in the rulings as to the law, on the trial. The record having been remitted to the Trial Court, judgment was rendered February 18th, 1890, directing that Holden be taken to the County Jail of Brown county, and there confined, and after the lapse of three months, and at a time to be fixed by the Governor, and designated by his warrant, he be hung by the neck until he should be dead. A copy of the judgment is attached to the petition, (Record, page 8). The Statutes under which he was sent to Brown county are set out in the Return. (See Record, p. 16).

His Excellency, Governor Merriam, afterwards, on May 21st, 1890, issued his warrant to the Sheriff, commanding that Holden be so executed on June 27th, A. D. 1890. A certified copy of the warrant is also attached to the petition. (Record, page 11).

Meantime, the Legislature of the State of Minnesota, on April 24th, 1889, enacted Chapter 20 of the laws of that year, which took effect from and after its passage. A copy of this Statute is attached to the petition (Record, page 10), and may also be found in the Session Laws of Minnesota, for 1889, page 66.

On June 19th, 1890, the Petition of Clifton Holden was presented to the Circuit Court for the District of Minnesota, praying for a writ of Habeas Corpus, and an order was granted, directing the writ to issue, returnable June 24th, A. D. 1890. The writ was issued and served upon John B. Schmid, Sheriff of Brown

county, and on C. W. Mead, Sheriff of Redwood county. As there was no jail in Redwood county, Holden had been confined in the jail at New Ulm, in Brown county, awaiting the time of his execution. (Record, page 16.) For this reason both Sheriffs are named in the writ of Habeas Corpus.

On the return day of the writ, the Respondents appeared in the Circuit Court by Hon. Moses E. Clapp, Attorney General of the State of Minnesota, and it was stipulated that the personal presence of Holden be waived, without prejudice in any manner of his rights; (Record, page 27,) and that any and all Statutes of the State of Minnesota, pertinent to the matters in issue might be referred to, and read upon the argument and consideration of his application, from the printed volumes in ordinary use, as if specially referred to or set out in the pleadings, and proven in due form before the Court. (Record, page 26.)

The Respondents thereupon filed their answer to the writ, and therein set forth various Statutes of Minnesota, some of which had been modified or repealed by, or prior to, the Act of April 24th, 1889,

The petitioner having traversed the return, it was ordered by the Circuit Court that the hearing be adjourned to July 2d, A. D. 1890, and that meantime all proceedings under the warrant of his Excellency, the Governor, be stayed, and that Holden be safely held and kept until the further order of the Court in the premises. The hearing was had on that day. On the following day an order was made denying Holden's application for his discharge. (Record, page 31.)

The opinion of the Circuit Court on denying the petitioner's discharge is contained in the Record, commencing at page 43.

On July 9th, 1890, Holden's appeal to this Court was allowed (Record, page 37), and he ordered detained

in custody pending the appeal (Record, page 38.) A certified copy of the record was, on August 16th, A. D. 1890, filed in this Court, together with the Petitioner's assignment of errors. (Record, page 51.):

The petitioner contends that the punishment for murder was altered after the death of Dodge and before Petitioner was put upon trial,—altered by Chapter twenty (20) of the Session Laws of 1889, and the punishment increased by adding solitary confinement;—that as to his case this Act of 1889, is *ex post facto*, and that Section three (3) of Chapter four (4), of the General Statutes of Minnesota, does not prevent its application to his case. All other questions on this appeal seem to be settled in Petitioner's favor by the late decision of this Court, in the case of *Medley, Petitioner, 134 U. S., 160.* An examination of this question will be facilitated by grouping the Minnesota Statutes supposed to be applicable, in chronological order. They are so set out in an appendix to this brief. To them, the attention of the Court is respectfully invited.

Solitary confinement in addition to death as punishment for the crime of murder, was abolished in Minnesota, by Chapter 88 of the Laws of 1868, p. 129. Prior to that time, Section 2 of Chapter 94 of the General Statutes was in force. The compilation of General Statutes of 1878, contains this Section 2 of Chapter 94, and also the Act of 1868, except the fifth section. The omitted section repeals all acts and parts of acts contravening the provisions of that act of 1868.

By the Laws of 1876, Chapter 79, page 91, solitary imprisonment in the State prison was abolished, except for prison discipline.

The Legislature of the State of Minnesota again prescribed the punishment for murder in the first degree, by Chapter 122 of the Laws of 1883, page 164.

By Section two (2) of this Act, pending prosecutions and prior offenses were excepted, and by Section three (3) all Acts and parts of Acts inconsistent with that Act were repealed.

Again in 1885, the Legislature of Minnesota enacted the Penal Code, of that State. By Section 156 it is provided that murder in the first degree is punishable by death, and by Section 541, it repealed Chapter 94, of the General Statutes, and all acts and parts of acts inconsistent with the provisions of that Code, so far as they defined any crime or imposed any punishment for crime.

From this examination of the Statutory Law of Minnesota, it appears that solitary confinement as a punishment for murder was not lawful prior to the Act of 1889, Chapter 20, p. 66. By Section 4 of the last named Act, solitary confinement was added to the previous penalties imposed by Statute for the crime of murder in the first degree, and all former acts inconsistent therewith were by the seventh Section repealed.

It would seem that the nearly parallel Case of *Medley, Petitioner, 134, U. S., 160*, should relieve the Petitioner from further argument to show the law of 1889, to be *ex post facto* when applied to Holden's case; and the repeal by the seventh Section of inconsistent former laws without a saving clause, to be an Act of amnesty as to him, and his subsequent imprisonment unlawful.

But it is claimed by the Attorney-General for the State of Minnesota, that the former laws for the punishment of murder are not superceded, because the Act of 1889 is to be read in connection with Section 3 of Chapter 4, of the General Statutes of Minnesota, which

provides that when a repealing act is itself repealed, the former law should not be thereby revived, and that *such* repeal should not affect any penalty incurred, or any proceeding commenced under or by virtue of the law repealed, and on this ground the Circuit Court denied the Petitioner's discharge.

This Minnesota Statute is unlike those referred to in the opinion filed below in this case. It is narrowed *ex industria*. The Statute of Massachusetts was enacted June 17th, 1869, and is as follows:

Massachusetts.

First. The repeal of an act or resolve shall not revive any statute in force before the act or resolve repealed took effect.

Second. The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the act repealed.

United States.

On February 25th, 1871, Congress enacted as follows:

§ 3. *And be it further enacted*, That, whenever an act shall be repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided.

§ 4. *And be it further enacted*, That the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. See *U. S. Rev. Stat. Sections 12 and 13.*

In the Northwestern States these enactments were only partially adopted. They were not approved in

their full extent. About this time they severally enacted as follows:

Michigan: Whenever a statute, or any part thereof, shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the repeal of such subsequent, repealing statute.

1 Compiled Statutes, A. D. 1857, Chapter 1, § 4.

Wisconsin: No act or part of an act, repealed by a subsequent act of the legislature, shall be deemed to be revived by the repeal of such repealing act.

1st Taylor's Statutes, A. D. 1871, Chap. 5, § 3.

Iowa: The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.

Iowa Genl. Stat. of 1860, Chap. 3, § 29, (1st.)

The cognate statute in Minnesota, Chapter four (4) Section three (3), was first enacted there in 1866. It was then experimental, had not been elsewhere construed by courts, and was in terms confined to Acts which repealed former Acts. Such repeal of a repealing Act, was not to affect any penalty incurred or any proceeding commenced. Grammatically construed this is the extent of the Minnesota enactment, and so it has been construed by her Courts and considered by her Legislature. The repeal of a Law which repealed a former Law, is the subject and the only subject upon which this Statute speaks. It is not to be expanded by construction so as to take human life, but rather, to be restricted in mercy to the accused.

The Supreme Court of the State of Minnesota, in *Miller vs. Miller, 39, Minn., R. 376,* has said of this Statute that the Court doubted that this Statute applies to repeals by implication, or to those repeals effected by

the provisions of an Act being inconsistent with some provision of a former Act.

In *State vs. McDonald, 20 Minn., R. 136*, the Defendant was indicated for having, on June 17th, A. D. 1871, pulled down a dwelling house in violation of Section 7 of Chapter 98 of the General Statutes of Minnesota, which then read as follows:

§ 7. If any of the persons so unlawfully assembled demolish, pull down or destroy any dwelling house, or any other building, or any shop, steamboat or vessel, he shall be punished by imprisonment in the State prison, not more than seven years, nor less than three years.

The indictment was found in December, 1871. Afterwards the Legislature on March 1st, 1872, passed an Act in the words and figures following:

§ 1. That Section seven of chapter ninety-eight of the general statutes of Minnesota, be and the same is hereby amended so as to read as follows:

§ 7. If any of the persons so unlawfully assembled demolish, pull down, or destroy any dwelling house, or any other building, or any shop, steamboat or vessel, he shall be punished by imprisonment in the State prison not more than seven years nor less than three years, *or by fine not exceeding one thousand dollars in the discretion of the Court.*

§ 2. This act shall take effect and be in force from and after its passage. Approved March 1, 1872.

The Defendant afterward demurred to the indictment on the ground that by the addition of the words printed in italic, the former section was superceded and that the section as amended was as to him, a new and an *ex post facto* law, and the Supreme Court so held, saying the old law was no longer in force; that the new act had superceded it and taken its place, and that the Defendant could not be convicted or punished under the section as it stood before amendment.

Now, if section three (3) of chapter four (4) of the General Statutes, had been applicable to that case, the

Supreme Court could not have so decided. That case can not be distinguished from this of Holden, nor will it do to presume that our Supreme Court did not know the Statute law of the State, or heed it in making this decision. The word "*such*" in the Statute cannot be changed to "*any*" by the judiciary, however heroic the courts may be inclined to be in construction. It is only the repeal of a repealing act that is mentioned in that section.

This is the construction adopted by the legislative branch of the State government. For in many acts passed since the Revised Statutes were enacted in 1866, special provision has been made, upon the repeal or alteration of statutes defining crimes or awarding punishements, that such repeal should not affect prosecutions then pending for violations of the law repealed. These provisions were unnecessary and useless if section three (3) of Chapter four (4) of the General Statutes, performed that office. The following are named as some of these statutes:

Laws 1873, Chap. 9, § 7, page 117.
Laws 1881, Chap. 2, § 2, page 76.
Laws 1883, Chap. 65, § 3, page 65.
Laws 1883, Chap. 72, § 1, page 71.
Laws 1883, Chap. 128, § 1, page 204.

The laws of 1868, and of 1883, of which copies are printed with this brief, show a like special provision.

Petitioner further contends that Statutes for the punishment of murder are not within the purview and intent of Section three (3) of Chapter four (4) of the General Statutes of Minnesota, which reads, 'nor shall such repeal affect any right which accrued any duty, imposed any penalty incurred, nor any proceeding commenced." The term "*penalty*" is ordinarily and mostly applied to a pecuniary punishment. The term "*proceeding*" ordinarily and mostly applies to a civil

action; "prosecution" is the term applicable to a criminal action. The lexicographers so define these words. See *Penalty* in Bouvier and Webster.

This Section three (3) of Chapter four (4), of the General Statutes of Minnesota, was as before stated, first enacted in Minnesota, in 1866. All General Laws of that State were revised, amended and reenacted in that year. In 1863, an act was passed, chapter 25, appointing Commissioners to revise the Statutes of that State, and prepare a report and cause it to be printed and submitted to the Legislature. By Session Laws of 1864, Chapter 44, and by session Laws of 1865, Chapter 58, amendments were made to the act of 1863. In 1866, these commissioners submitted to the Legislature a revision of the General Statutes, substantially the body of Law since known as the General Statutes of 1866, and introducing for the first time in that State, Section 3 of Chapter 4. Accompanying this body of Statutes, the commissioners submitted a Report which was separately printed in a pamphlet of some forty pages, in which they stated the principles on which they proceeded, and the reasons for the changes they proposed.

On page six (6) of that Report, the commissioners say regarding Section 3 of Chapter 4 as follows:

"Section 3 seemed to the commissioners to be proper and necessary as a general and continuing rule, but is not intended to apply to cases of a strictly criminal nature."

With this explanation before them, the Legislature enacted that Revision of our laws, and it has remained unaltered ever since. The profession and the Courts have ever since assumed that this report and limitation of this section, was the correct interpretation of its language and *State vs. McDonald 20. Minn., 136*, was decided in accord with this view, that this Section had no application to cases of a strictly criminal nature.

The subsequent Legislatures of Minnesota, have also acted on this explanation as I have before shown.

The Supreme Court of Massachusetts in *Commonwealth vs. McDonough, 95 Mass., R. 581*, said:

It is desirable that all offenders against our penal laws should be punished, yet it is better that one should occasionally escape than that the fundamental principles of the criminal law should be violated. It is also to be considered that the Legislature might have inserted in the repealing act a saving clause which would have prevented the Defendant's escape, if they had seen fit to do so. If they omitted it through mistake the Court cannot correct the mistake—nor have we a right to decide that the omission was by mistake.

It does not seem possible that this august Court should under these circumstances interfere and set at naught the construction assumed and acted upon in that State for a quarter of a century, and do so not in furtherance of mercy but to take the life of one not otherwise legally subject to execution. The interpretation given a law by the courts and people of Minnesota becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature.

Chicago Bank vs. Kansas Bank, 136 U. S., 235.

A construction has been given the Statutes of Minnesota in *State vs. McDonald, 20 Minn., 136*, to the effect that Section three (3) has no application in a case like the present. It is intolerable to say of that learned Court and of the counsel in that case, that they were alike ignorant of the existence of this Statute because they acted on the view of that law put upon it by the commissioners and for which Petitioner here contends.

If this Section three (3) of Chapter four (4) is inapplicable and out of the discussion, then Holden's case does not differ in any material respect from Medley's case. The Colorado Act and the Minnesota Act are identical in legal effect so far as they touch any question involved in this case.

The Petitioner contended in the Circuit Court that the Governor could not fix the day of his execution, that this duty belonged to the judicial branch of the State Government. After the day was actually appointed it became immaterial who issued the warrant for his execution, whether the Clerk of the Court, the Secretary of State, or the Chief Executive. It seems by the opinion filed that his contention was misapprehended, but as the point is probably not a Federal question, its argument is not pursued.

It is possible that Respondents may here abandon the ground on which their Return is based and on which this case was determined in the Circuit Court, and may claim that the Act of 1889 repeals nothing and being *ex post facto* as to Holden, is inoperative in his case and therefore that the prior Statute stands unaffected as to him. The venerable Justice Miller, who sat with Judge Nelson in the Circuit Court, and who wrote the opinion filed there (Record, page 43), rejected this contention on the argument. Indeed, it is impossible to reconcile the adjudged cases with it.

There is no evidence in the Act of 1889, that it was the intent of the Legislature that the person convicted should be executed if he could not be first kept in solitary confinement in preparation for that event. All the legislative provisions, both this act and the former Statute, are to be considered together as one Act, as one Statute, and together expressing the will of the Legislature of 1889, on the subject of murder and its punishment. If a part is unconstitutional and inoperative as to Holden, the remainder is not to be held to be the will of that legislative body—and executed as if it were the

whole law on the subject of punishment for murder. The legislature have not in this case said the old law shall be the rule for old offenses.

In *Calder vs. Bull, 3 Dallas, 390,* Chase, J., says:

Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law.

The amendment is not alone *ex post facto;* the entire punishment both the death and the imprisonment are *ex post facto.* Holden cannot be punished by death alone, as the Legislature have enacted that it and solitary confinement both shall be the punishment of murder, and it is no longer the legislative will that death alone shall be the extent of his punishment. Had the legislature so intended. it could easily have said that for past offences the law before amended should apply, or that for future offences both should be inflicted. But they failed to do either, and in legal effect required that both death and solitary imprisonment should be inflicted for both past and future offences. This amounted to amnesty, and the legislature is supposed to have understood the law, and to have intended that result.

It was not the legislative will that the old law should remain in force unamended as to past offences, or they would have said so by an exception as in the Act of 1883. Failing to do that their intent must have been that both solitary confinement and death should be thereafter inflicted in all cases, or neither. This principle is not doubted in *Medley Petitioner, 134 U. S., 160,* or in *State vs. McDonald, 20 Minn., 136.* Both cases go upon this construction of the Legislative will as evidenced by the Statute.

By the Minnesota Statute of 1889, Chapter 20, solitary confinement of the prisoner from the issuing of the warrant for his execution until he should be exe-

cuted, was imposed. By the Fourth Section of that Act, the following named persons were allowed to visit him, but none other, viz: The Sheriff and his deputies, the prisoner's counsel, any priest or clergyman he might select, and the immediate members of his family. He could not have a physician or relative or friend. This condition might be protracted any number of days or years in the discretion of the Governor; he might today issue his warrant directing his execution one year or five years hence. This new punishment for murder which, in legal effect the legislature substituted for the old, is one which imposes additional punishment to that prescribed when the crime was committed. Solitary confinement was neither authorized by the former Statute since 1868, nor was its practice in use in regard to prisoners awaiting the punishment of death. This additional punishment is of the most important and painful character, and is justly portrayed in the opinion of this Court in Medley's case.

The only issue of fact in the Court below was whether the prisoner had been actually kept in solitary confinement. The Respondents by their return, say they have disobeyed the Act of 1889 in this respect, and have given the petitioner the liberties of the jail and an *ex parte* affidavit is filed in support of the return on this point. On that ground it seems to be claimed that the prisoner will be adjudged a different fate. But to petitioner, it seems that the actual manner of his imprisonment is irrevelant to the question in debate. When the jailor can by the manner of confining his prisoner, cause his execution or his discharge, he will have become a most important man in the administration of the criminal law.

The case at bar is not different from what it would have been, if the Legislature instead of passing the Act of 1889, Ch. 20, had amended the *Penal Code*, § *156*, by

inserting before the proviso the whole of Section 4 of this Act of 1889.

The Statute Law is as completely and effectually altered as if this had been done. Hence *State vs. McDonald, 20 Minn., 136*, is decisive of this case.

This later Act of 1889, is not unconstitutional and therefore void. It is operative and in full effect in Minnesota today as to offences committed since the date of its passage. It is the law of that State, and has effect as such. As to future offenses it adds solitary imprisonment to the previous punishment. As to past offences it would also have the same effect, were it not that the Federal constitution diverts its operation into amnesty by forbidding it to be enforced against those guilty of such past offenses. The Federal constitution does not interfere with the Act any further than to prevent the punishment under it, of those guilty of prior offenses. The Statute of the State remains unimpaired in all respects, and in full effect except in the effort to apply it to old offences. The amendment of the State Statutes and the repeal of inconsistent acts remain in full force, but the Federal constitution prevents the application of the new Statute to the case of the Petitioner.

If the Federal constitution made void the Act because *ex post facto*, it would not be the law for any purpose—the repealing clause in it would be void with the rest, and the previous Statutes would be unaffected, and in force for all purposes.

But the new law is not void. It has full force and operation. As to past offenses the Federal Constitution steps in, and takes the prisoner out of its hands—but leaves the State Law otherwise unaffected. The adjudged cases can not be otherwise explained.

In a note to *Wharton vs. State, in 94 Am. Dec. 219, (5 Caldwell 1)*, it is said that an act increasing the punishment for a crime and not directly repealing the old

law, leaves offences committed prior to the passage of the last Statute to be dealt with under the old law, and cites in support, *Miles vs. State, 40 Ala. 39. Moore vs. State 40 Ala. 49. Stephen vs. State 40 Ala., 67. Wade vs. State, 40 Ala. 74. State vs. Miller 58 Ind., 399.*

This statement in this note is the only authority in the books so far as I have discovered for the doctrine stated in it. On examination of the cases cited, it will be seen that they do not support this statement. The Alabama Statute of Dec. 15, 1865, enacted that from and after the passage of that act, any person who should be guilty of the offence of grand larceny, arson or burglary on conviction thereof should suffer death or be imprisoned in the penitentiary for any period not less than five years. The previous Statute, *Code § 3183*, provided for imprisonment only. The Alabama Court in 1867, held that the words in the new act "*from and after the passage of this act*," confined it in its operation to offences committed after it was passed, and that it did not touch prior offences and said: "The act, certainly applies by its terms only to offences committed after its passage. All these Alabama decisions are based on the same Act of Dec. 15, 1865, and are merely constructions of the language of that Statute, and not expositions of the general rules applying to *ex post facto* laws.

In *State vs. Miller, 58 Indiana, 399*, the old law *Ind. R. S. p. 442*, provided that every person who should feloniously steal goods of the value of *five* dollars or upward, should be deemed guilty of grand larceny and punished, etc. On March 3d, 1877, this law was amended so as to read *fifteen* in the place of *five* dollars. There was no repeal in the amendatory act. Before the amendment viz: on Sept. 2d, 1876, the prisoner stole a silver watch and chain of the value of $23. The Indiana court says that the amended Statute is not inconsistent with the prior statute, so far as it is applicable

to this case, for both Statutes made the prisoner's acts grand larceny. It appears then that this case does not sustain the note in its statement of the operation of *ex post facto* laws. The note should have said that an act increasing the punishment of future offenses only, and not directly repealing the old law leaves prior offenses unaffected.

It is submitted that the more correct rule is stated in Endlich on the interpretation of Statutes, § 239, and the cases there cited.

Henderson vs. Sherborne, 2 M. & W., 236.
Atty Genl. vs. Lockwood, 9 M. & W., 391.
Flaherty vs. Thomas, 94 Mass., 428.
Leighton vs. Walker, 9 N. H., 59.

The rule and the reasons for it were clearly stated, in *Flaherty vs. Thomas* by one now a Justice of this Court, as follows:

A Statute enacted by the people, through its representatives to whom the legislative power has been intrusted by the constitution of the State, for the punishment of a certain kind of crime, establishes a rule by which the actions of all persons within the jurisdiction are to be governed, and all violations of the rule punished; and thereby implies that, in the opinion of the sovereign legislature, the law previously existing, so far as it is inconsistent with the new law, does not prescribe a suitable punishment for such a crime, and is not fit to be continued in force; and therefore the later statute, laying down a new rule, in the absence of any qualifying clause, supersedes and abrogates the former law as completely as if that had been repealed in express words.

Former laws indeed are not repealed by implication, except so far as they are inconsistent with a later statute. This inconsistency may arise either from a new enactment which covers the whole subject, or from a statute which simply imposes a new punishment, whether greater or less in degree, for the same kind of crime. Where the punishment only is altered, the

extent of the effect of the repeal depends upon the nature of the change. If it only mitigates or alleviates the punishment, an offence committed while the old law was in force may be punished according to the new and milder rule. *Dolan v. Thomas, 94 Mass. 421*, and cases cited. But where the new law authorizes a punishment greater in degree, or so different in kind that it cannot be held to be a mere mitigation of the punishment; as if, for instance, in the case of an offence punishable by either fine or imprisonment, the statute diminishes the extreme limit of imprisonment, and increases the limit of the fine, which may be imposed by the Court; the former law is wholly repealed. *Commonwealth v. Davis, 11 Gray, 48*, and cases cited. And in such case, a person who violated that law while it was in force, cannot be punished at all; for he cannot be sentenced under the old rule, because that is repealed; nor under the new rule, because that imposes a punishment to which the offence was not liable at the time of its commission.

The most plausible argument in favor of considering the former statutes as still applicable to offences committed and convictions had before the passage of the Statute of 1866, *c. 280* § § *1, 3*, is that these sections apply only to persons afterwards convicted, and cannot, if they impose an increased penalty, extend to offences committed before their enactment, and therefore, so far as those offences are concerned, are not inconsistent with the previous statutes and do not repeal them. But all criminal statutes are limited in effect, and usually in terms, to future offences. And the argument overlooks the principle upon which a repeal by implication rests, namely, that the establishment of a new rule of punishment is of itself a legislative declaration that the previous rule is not fit to exist, and therefore shall not be applied to any case, unless the legislature, in order to prevent offences already committed from going unpunished, provides that such offences shall continue to be punished according to the previous laws. That, in the absence of any such provision, the old law cannot be resorted to after the new law has taken effect, for the punishment of an offence committed before the passage of the latter, even if the offender has been already convicted by the verdict of a jury, is clearly settled by authority.

Genl. Statutes of Minn., Ch. 118, § 6, is set out in the Return to the writ, and is relied upon by the Attorney-General as applicable in this discussion. This section has been the Statute Law here from the organization of the Territory of Minnesota.

Minn. Revised Statutes of 1841, Ch. 130, § 1, p. 565.

Minn. Compiled Stat. of 1858, Chap. 116, § 1, p. 779.

Minn. Genl. Stat. of 1866, Ch. 118, § 6 p. 665.

Minn. Genl. Stat. of 1878, Ch. 118, § 6 p. 965.

It was literally copied from the statutes of Wisconsin, but had its origin in Massachusetts, where it reads as follows:

§ 1. In cases of legal conviction where no punishment is provided by statute, the Court shall award such sentence as is conformable to the common usage and practice in this State according to the nature of the offence and not repugnant to the constitution.

Mass. Genl. Stat. of 1860, Ch. 174, § 1, p. 844.

Mass. Genl. Stat. of 1882, Ch. 215, § 1, p. 1203.

When Dodge died and the crime (if any) was committed the punishment for murder was death (*Penal Code § 156,*) and therefore punishment was provided by Statute, and the provisions of *Ch. 118, § 6,* did not apply. The statute by its terms applies only where no punishment is provided, i. e., provided at the time of the commission of the offence. To apply it to the time of trial or sentence would make the punishment *ex post facto* and unconstitutional. No such construction will be indulged.

This question arose under the Massachusetts Statute in *Commonwealth vs. McDonough, 95 Mass., 583,* and that able Court said on that occasion:

It is said therefore that the offence may be punished according to the provision of *Gen. Stat. Ch. 174, § 1.* This section provides that in case of legal conviction, where no punishment is provided by statute, the Court shall award such sentence as is conformable to the common usage and practice of this State, according to

the nature of the offence, and not repugnant to the constitution. But when this offence was committed and this complaint was made, the punishment was provided by statute, and therefore the *Gen. Stat. Ch. 174*, did not apply to it. The penalty was repealed by the statute of 1866, without a saving clause, and we must presume that the repeal was made by the legislature in view of the principle stated in *Commonwealth v. Marshall, 11 Pick. 350*, that if the law ceases to operate by its own limitation or by a repeal at any time before, no judgment can be given. Hence it is usual in every repealing law to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force, as to all pending prosecutions, and often as to all violations of the existing law already committed.

C. C. WILLSON,

Counsel for Petitioner,

Rochester, Minn.

APPENDIX.

Minnesota General Statutes of 1866.

Chapter 94.

Offences Against Life and Person.

§ 1. The killing of a human being, without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case.

§ 2. Such killing, when perpetrated with a premeditated design to effect the death of the person killed, or any human being, shall be murder in the first degree, and whoever is convicted of the same shall suffer the penalty of death; but any person convicted of any capital crime shall be kept in solitary confinement for a period of not less than one month nor more than six months, in the discretion of the judge before whom the conviction is had; at the expiration of which time it shall be the duty of the governor to issue his warrant of execution. Such killing, when perpetrated by any act eminently dangerous to one or more persons, and evincing a depraved mind, regardless of the life of such person, or persons, although without any design to effect death, shall be murder in the second degree, and shall be punished by imprisonment in the State prison for life; when perpetrated without any design to effect death, by a person engaged in the commission of any felony, it shall be murder in the third degree and be punished by imprisonment in the State prison not more than thirty years, nor less than seven years.

Minnesota General Statutes of 1866.

Chapter 118.

Judgments in Criminal Cases and the Execution Thereof.

§ 3. When any person is convicted of any crime for which sentence of death is awarded against him, the Clerk of the Court, as soon as may be, shall make out and deliver to the Sheriff of the county, a certified copy of the whole record of the conviction and sentence;

and the sheriff shall forthwith transmit the same to the governor; and the sentence of death shall not be executed upon such convict until a warrant is issued by the governor, under the seal of the State, with a copy of the record thereto annexed, commanding the sheriff to cause the execution to be done; and the sheriff shall thereupon cause to be executed the judgment and sentence of the law upon such convict.

§ 4. The Judge of the Court at which a conviction requiring judgment of death is had, shall, immediately after conviction, transmit to the governor, by mail, a statement of the conviction and judgment, and of the testimony given at the trial.

§ 5. In every case in which punishment in the State prison is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; *provided*, that whenever practicable, the term of imprisonment shall be so fixed that it will expire between the first day of April and the first day of November.

§ 6. In any case of legal conviction where no punishment is provided by statute, the court shall award such sentence as is according to the degree and aggravation of the offence, not cruel or unusual, nor repugnant to the constitutional rights of the party.

§ 11. The punishment of death shall, in all cases, be inflicted by hanging the convict by the neck, until he is dead; and the sentence shall at the time directed by the warrant, be executed at such place within the county as the sheriff shall select.

§ 12. Whenever the punishment of death is inflicted upon any convict, in obedience to a warrant from the governor, the sheriff of the county shall be present at the execution, unless prevented by sickness or other casualty; and he may have such military guard as he may think proper. He shall return the warrant with a statement under his hand of his doings thereon, as soon as may be after the said execution, to the governor, and shall also file in the clerk's office of the court where the conviction was had, an attested copy of the warrant and statement aforesaid, and the clerk shall subjoin a

brief abstract of such statement to the record of conviction and sentence.

Minnesota General Statutes of 1866.

Chapter 4.

Statutes—Their Construction and Repeal.

§ 3. Whenever a law is repealed, which repealed a former law, the former law shall not thereby be revived unless it is so specially provided, nor shall such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the law repealed.

Minnesota Session Laws of 1868.

Chapter 88.

An Act to Prescribe the Penalty for the Crime of Murder in the First Degree. Approved March 5th, 1868.

Be it Enacted by the Legislature of the State of Minnesota.

§ 1. The penalty of death as a punishment for crime, is hereby abolished in this State, except in the cases provided for in section two of this act, and hereafter the penalty for the crime of murder in the first degree shall be as prescribed in sections two and three of this act.

§ 2. Whenever upon the trial of any person upon an indictment for murder in the first degree, the jury shall have agreed upon a verdict of guilty of such offence, such jury may also determine in the same manner, that the person so convicted shall be punished by death, and if they so determine, shall render their verdict accordingly; and in such case the person so convicted shall be punished by death, as prescribed by section two, of chapter ninety-four, of the general statutes, for the punishment of murder in the first degree.

§ 3. Whoever shall be convicted of murder in

the first degree if the jury upon whose conviction the penalty is inflicted, shall not by their verdict prescribe the penalty of death, shall be punished by imprisonment, at hard labor in the State prison during the remainder of the term of his natural life, with solitary confinement upon bread and water diet for twelve days in each year during the term, to be apportioned in periods of not exceeding three days duration each, with an interval of not less than fourteen days intervening each two successive periods.

§ 4. The provisions of this Act shall not apply nor extend to an act done, nor offense committed prior to the passage hereof, but the provisions of law now in force and applicable to the crime of murder in the first degree, as well in respect to the penalty affixed to the commission of such crime, as in all other respects, shall be and remain in full force and effect as to any such offense heretofore committed.

§ 5. All acts and parts of acts contravening the provisions of this act, are hereby repealed.

§ 6. This act shall take effect from and after its passage and approval.

Approved March 5, 1868.

Note.

In 1878, a new compilation was made of the Statutes of Minnesota, by inserting the Acts subsequent to 1866, into the several Chapters of the General Statutes of 1866. This compilation is known as the "General Statutes 1878." In this compilation the foregoing Chapter 88 of the Session Laws of 1868, is inserted in Chapter 94 as sections 3, 4, 5 and 6.

Minnesota Session Laws of 1883.

Chapter 122.

An Act Prescribing the Punishment of Murder in the First Degree. Approved March 2, 1883.

Be it Enacted by the Legislature of the State of Minnesota.

§ 1. Whoever is guilty of murder in the first (1st) degree shall suffer the punishment of death. Provided, that if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which the penalty of death should be imposed, the punishment shall be imprisonment for life in the penitentiary.

§ 2. The provisions of this act shall not apply nor extend to any act done nor offense committed prior to the passage hereof, but the law now in force applicable to the crime of murder in the first (1st) degree, shall, for all purposes, be and remain in full force and effect as to any such offense heretofore committed.

§ 3. That sections three (3), four (4), five (5), and six (6), of chapter ninety-four (94), general statutes, one thousand eight hundred and seventy-eight (1878), as well as all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.

§ 4. This act shall take effect and be in force from and after its passage.

Approved March 3, 1883.

The Penal Code.

An Act to Establish a Penal Code Approved March 9th, A. D. 1885.

Be it Enacted by the Legislature of the State of Minnesota.

§ 152. The killing of a human being, unless it is excusable or justifiable, is murder in the first deegree, when perpetrated with a premeditated design to effect the death of the person killed, or of another.

§ 156. Murder in the first degree is punishable by death; *Provided*, That if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which

the penalty of death should be imposed, the punishment shall be imprisonment for life in the State prison.

§ 541. Chapters 93, 94, 95, 96, 97, 98, 99, 100 and 101 of the General Statutes of 1878, and all acts and parts of acts which are inconsistent with the provisions of this act are repealed, so far as they define any crime or impose any punishment for crime, except as herein provided.

§ 542. This act shall take effect on the first (1st) day of January, 1886. When construed in connection with other statutes, it must be deemed to have been enacted on the sixth (6th) day of January, 1885, so that any statute enacted after that day is to have the same effect as if it had been enacted after this code.

Approved March 9, A. D. 1885.

Minnesota Session Laws of 1889.

Chapter 20.

An Act Providing the Mode of Inflicting the Punishment of death, the Manner in which the same shall be Carried into Effect, and Declaring a Violation of any of the Provisions of this Act to be a Misdemeanor. Approved April 24, 1889.

Be it Enacted by the Legislature of the State of Minnesota.

§ 1. The mode of inflicting the punishment of death, shall in all cases be hanging by the neck until the person is dead.

§ 2. Whenever the punishment of death is inflicted upon any convict in obedience to a warrant from the governor of the State, the sheriff of the county shall be present at the execution unless prevented by sickness or other casualty; and he may have such military guard as he may think proper. He shall return the warrant with a statement under his hand of doings thereon as soon as may be after the said execution to the governor, and shall also file in the clerk's office of the court where the conviction was had, an attested copy of the warrant and statement aforesaid, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence.

§ 3. The warrant of execution shall be executed before the hour of sunrise of the day designated in the warrant and within the walls of the jail in all cases where the jail is so constructed that it can be conveniently done therein; but when the jail is not so constructed, the warrant shall be executed within an enclosure which shall be higher than the gallows, and shall exclude the view of persons outside, and which shall be prepared for that purpose, under the direction of the sheriff, in the immediate vicinity of the jail, or if there be no jail in the county, at some convenient place at the county seat, to be selected by the sheriff.

§ 4. After the issue of the warrant for execution by the governor, the prisoner shall be kept in solitary confinement, and the following persons shall be allowed to visit him, but none other, viz: The sheriff and his deputies, the prisoner's counsel, any priest or clergyman the prisoner may select, and the members of his immediate family.

§ 5. Besides the sheriff and his assistants, the following persons may be present at the execution, but none other: The clergyman or priest in attendance upon the prisoner and such other persons as the prisoner may designate, not exceeding three (3) in number, a physician or surgeon, to be selected by the sheriff, and such other persons as the sheriff may designate, not exceeding six (6) in number, but no person so admitted shall be a newspaper reporter or representative. No account of the details of such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper.

§ 6. Any person who shall violate or omit to comply with any of the provisions of this act shall be guilty of a misdemeanor.

§ 7. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

§ 8. This act shall take effect and be in force from and after its passage.

Approved April 24, 1889.

JAMES H. MCKENNEY

Supreme Court of the United States

OCTOBER TERM, 1890.

NUMBER —.

THE STATE OF MINNESOTA,
Defendant in Error.

vs.

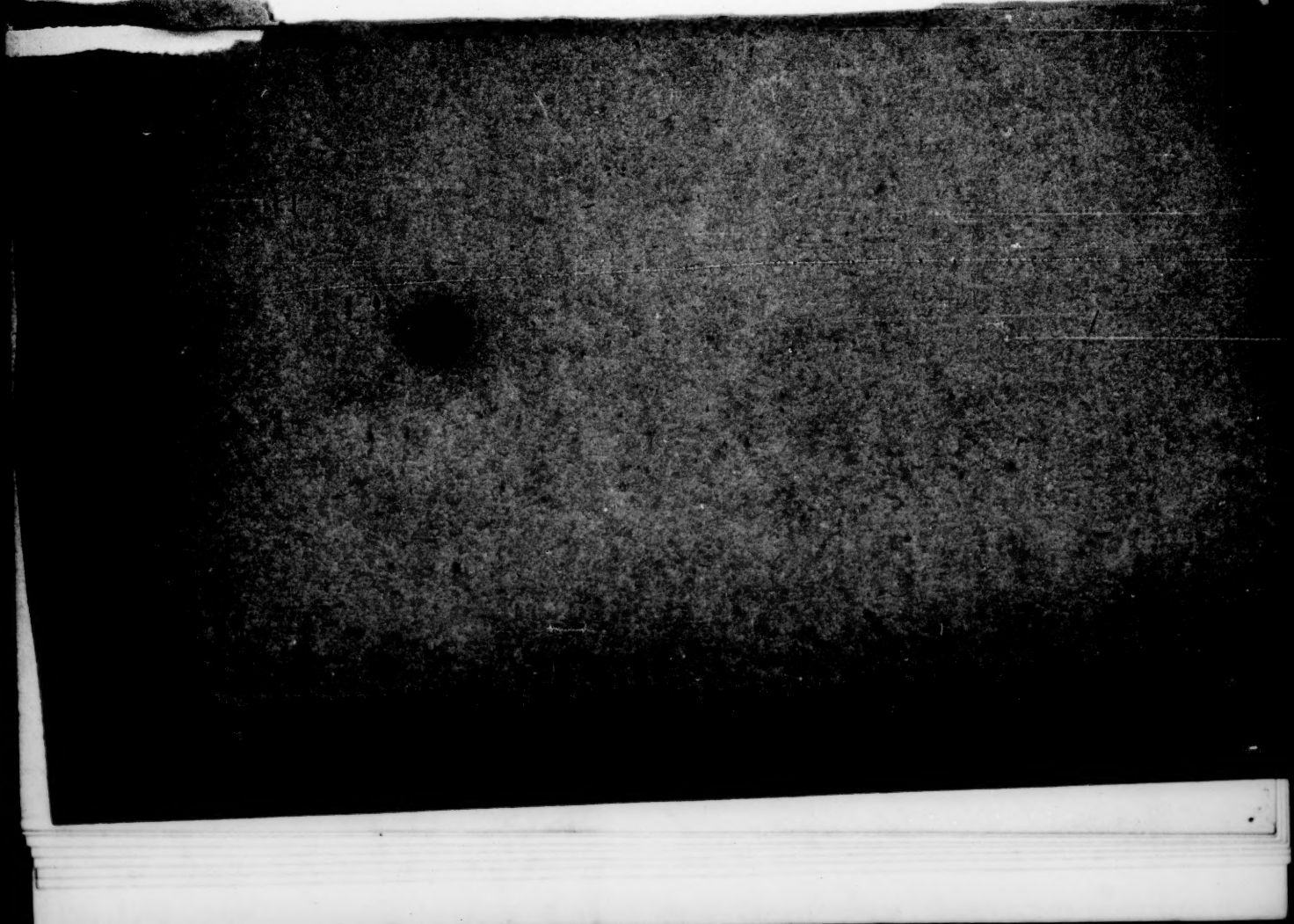
CLIFTON HOLDEN,
Plaintiff in Error.

Brief of Defendant in Error.

MOSES E. CLAPP,
Attorney General.

H. W. CHILDS,
Assistant Attorney General.

Attorneys for Defendant in Error.



Supreme Court of the United States.

OCTOBER TERM, 1890.

NUMBER —.

THE STATE OF MINNESOTA,

Defendant in Error,

vs.

CLIFTON HOLDEN,

Plaintiff in Error.

RESPONDENT'S BRIEF.

1. *Statement of Case.* One Frank Dodge came to his death at the village of Redwood Falls, in the County of Redwood, and State of Minnesota, on the 23d day of November, A. D. 1888. The death was feloniously effected by the plaintiff in error, for which he was thereafter indicted, and, on the 28th day of May, 1889, found guilty of murder in the first degree, as charged in the indictment. At the time when the crime was committed the penalty was death. April 24, 1889, thereafter, the act whose constitutionality is assailed in this appeal became a law and immediately operative. Section 4 of the act in question provides:

"After the issue of the warrant for execution by the Governor, the prisoner shall be kept in solitary confinement, and the following persons shall be allowed to visit him, but none other, viz: The sheriff and his deputies, the prisoner's counsel, any priest or clergyman the prisoner may select, and the members of his immediate family."—(*Gen. Laws Minn., 1889 c. 20, sec. 4.*)

The plaintiff in error contends that said statute is void as to his offense because *ex post facto*, within the meaning of Sec 10. of Art. 1, of the Constitution of the United States and relies in support of his position upon the case of *Medley, petitioner*, 134 U. S., 160.

2. *Argument.* The defendant in error urges upon the court these propositions:

1. That the statute of Minnesota, *supra*, differs essentially from the Colorado statute construed in the Medley case, and is not subject to the constitutional objections therein considered and held fatal.

2. That the statutes of Minnesota providing for the punishment of murder in the first degree were not repealed by the law of 1889, and that they amply provide for the execution of the sentence imposed upon the appellant by the court.

I.

In support of the first proposition, attention is called to the following considerations.

This court in the Medley case, *supra*, lay stress upon the fact that, by the terms of the Colorado statute, "instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff see him and visit him; where the sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to *a place where imprisonment always implies disgrace*, and which, as this court has judicially decided * * * is itself an infamous punishment, and is *there* to be kept in solitary confinement."

It will be noted that this feature, so objectionable in the Colorado statute, is not a characteristic of the Minnesota statute. Under the laws of the last named state the prisoner, instead of being transferred to the state prison, remains in the county jail, where he may be easily visited by his friends, his counsel, and spiritual advisers. The "ordinary county prison" has a well defined meaning. Solitary confinement, as explained in the Medley case, *supra*, cannot well be inflicted in such a place; nor has it ever been attempted, although invariably enjoined by the executive in the warrant of execution issued by him when the death penalty has been inflicted, as

well before as since the passage of the law of 1889. As to this appellant, he has wholly escaped it.

Nor is the Minnesota statute, like the Colorado statute, subject to the further criticism that the visitation of friends, and others, is limited by rules which the prison authorities may prescribe. The Colorado statute declares, in express terms, that visitations shall be made "only in accordance with prison regulations." (Sec. 2.) No such provision is found in the Minnesota statute of 1889. Indeed, this last named statute, secures to the prisoner, by the most pointed terms, the right to visitation by the persons therein named, the language being, "the following named persons *shall be allowed* to visit him." (Sec. 4.) This court dwells upon this feature of the Medley case, *supra*, at some length.

Furthermore, the court, in the case just cited, adverts to another feature of the Colorado statute. It is objected in its decision that "the particular day and hour of the execution of the sentence within the week specified by the warrant shall be fixed by the warden. * * * and that the time fixed by said warden for such execution shall be by him kept secret, and in no manner divulged except privately to said persons invited by him to be present as aforesaid, and such persons shall not divulge such invitation to any person or persons whomsoever, nor in any manner disclose the time of such execution. Notwithstanding the argument that under all former systems of administering capital punishment, the officer appointed to execute it had a right to select the time of *the day* when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offence was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment."

No such uncertainty attends the enforcement of the Minnesota statute.

It will be noted that the statute of 1889 in no wise affects the pre-existing law as to the imposition of the sentence, but appertains wholly to the mode or manner of inflicting the penalty already provided for the crime of murder in the first degree. The penalty for that crime is provided by section one hundred and fifty-six (156) of the Penal Code of that state, and is as follows:

"Sec. 156. Murder in the first degree is punishable by death: provided, that if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which the penalty of death should be imposed, the punishment shall be imprisonment for life in the state prison."

The Penal Code, *supra*, became a law March 9th, 1885, and went into effect January 1st, 1886. *(Penal Code Minn., Sec. 542.)*

The statutes of Minnesota have always invested the Governor of that state with authority to fix the date of execution. This is a necessary presumption from the statutes existing prior to the act of 1889, *supra*, and is expressly provided in the last named act.

It was provided by Gen. St. Minn. 1878, (c. 94, sec. 2,) that "any person convicted of any capital crime shall be kept in solitary confinement for a period of not less than one month nor more than six months, in the discretion of the judge before whom the conviction is had, at the expiration of which time *it shall be the duty of the Governor to issue his warrant of execution.*"

It was also provided by Gen. St. Minn. (c. 118, sec. 3,) as follows:

"When any person is convicted of any crime for which sentence of death is awarded against him, the clerk of the court, as soon as may be, shall make out and deliver to the sheriff of the county, a certified copy of the whole record of the conviction and sentence; and the sheriff shall forthwith transmit the same to the Governor; *and the sentence of death shall not be executed upon such convict until a warrant is issued by the Governor*, under the seal of the state, with a copy of the record thereto annexed, commanding the sheriff to cause the execution to be done; and the sheriff shall thereupon cause to be executed the judgment and sentence of the law upon such convict."

The last named statue has been recently twice assailed in the supreme court of Minnesota, which is the court of last resort in that state In the case of *State vs. Holong*, (38 Minn., 368) decided April 30, 1888, the court say, touching the authority of the Governor, under that statute: "On the notice (to stay execution) his (the prisoner's) counsel states the grounds on which the appeal is taken, which are * * * * *; that the statute which authorized the Governor, in capital cases, to cause execution to be done by issuing his warrant for that purpose, has been repealed by the Criminal Code. If we entertained any doubt on either of these propositions, we would not hesitate, in so grave a case, to stay execution until they could be fully and formally argued and determined in this court. *But the propositions are entirely groundless.*"

And again in the case of State vs. Barrett, (40 Minn., 75)

decided January 28, 1889, the same question was raised, and the court say:

"The assignment of error numbered 26, by which it is urged that *the statute granting power to and making it the duty of the Governor to fix and designate by warrant the day of execution* (Gen. St. 1878, c. 118 § 3.) has been repealed by the adoption of the penal code, was disposed of adversely to this construction, in *State vs. Holong*, 38 Minn., 368," and the question was there dropped; nor has it since been passed upon by that court.

This, then, so far as the appeal at bar is concerned, is a complete adjudication of the authority of the Governor under the statute in question, to fix the day of execution. It furthermore substantiates the proposition that the authority so expressly conferred by section three (3) of the statute of 1889, *supra*, is not an innovation upon the pre-existing law, but rather expressive thereof.

Reverting once more to the feature of the Colorado statute, which is declared to have been unknown in the laws of that state at the time the statute involved in the Medley case went into effect, and which confers upon the warden the power of fixing the day and hour of the execution and admonishes him to strict secrecy as to the same, we insist that the Minnesota statute assailed by the appeal, is in no wise subject to that objection. Under the Minnesota statute a definite day is fixed in the governor's warrant for the execution, thereby relieving the prisoner of the mental anxiety, amounting to a great increase of the offender's punishment incidental to the Colorado provision.

II.

It is earnestly contended that chapter 20 of the laws of 1889 did not repeal the pre-existing law, so that, if it should be held that the act of 1889 is *ex post facto* as to appellant's offense, there still remains ample authority under the pre-existing law for the execution of the sentence.

It is provided by the General Statutes of Minnesota (c. 4, §3) as follows:

"Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specially provided; nor shall such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the law repealed."

The defendant in error insists that the last-named statute must be read with, and as a part of, every repealing statute

enacted since its passage, unless a contrary rule is clearly intended by the terms of the repealing statute.

This doctrine is firmly supported in *United States vs. Reisinger, 128 U. S., 398.*

The only question possible to be raised upon the statute just cited is as to the interpretation to be placed upon the word "such", as used in the second clause of the section. What repeal is meant when the statute says, "nor shall *such* repeal affect any right, etc?" Two repeals are contemplated by the first clause of the section. To assume a case. A given law makes murder punishable with death; a later law repeals it, which in turn is repealed by a still later one.

Would the terms, "such repeal", in such a case relate to the second or third statute? Or, are they necessarily restricted to either? The obscurity in the letter may be relieved, it would seem, by reference to the manifest spirit of the act. As applied to a case like the one at bar, is it not the purpose of the provision to save from the effect of any and every repeal, in the absence of unequivocal terms to the contrary, all offenses arising under the statute repealed? It is questionable if any meaning whatever can be given to the second clause, unless it be held to provide as above suggested. A repealing statute is frequently restricted to its repealing force; and for the purposes of construction here, such should be the limitation placed upon the repealing acts contemplated in section 3, *supra*. If so, then the second clause were surely meaningless when it is attempted to have it relate to the repeal of the repealing act, as it is manifest that no right could "accrue," no duty be "imposed" and no penalty "incurred," under either of the repealing acts. But the statute clearly intends that these shall have accrued, been imposed and incurred "under or by virtue of *the law repealed.*"

But the construction for which the defendant in error contends is strengthened, if it is not made irresistible, by reference to another provision of the General Statutes of Minnesota. It is herein provided (c. 121 §§ 3, 6 *Gen. St.* 1878):

§ 3. The repeal of the acts and resolves, and parts of acts and resolves, revised and re-enacted herein, or repugnant to the provisions hereof, shall not revive any law heretofore repealed or superseded, nor any office heretofore abolished.

§ 6. It shall not affect any action or prosecution pending at the time of the repeal, for an offense committed or for the recovery of a penalty or forfeiture incurred, under any of the acts repealed, except that the pro-

ceedings therein shall, when necessary, conform to the provisions of the General Statutes.

The above provisions clearly indicate that the policy of the legislature of that state, as evinced as early as 1866, and adhered to during all subsequent years, has been to guard against amnesty legislation in general repealing statutes.

Assistance is derived from an examination of the legislation both of the federal government and the several states, as provisions similar to those now under consideration have been generally adopted.

Rev. Stat. U. S., *Secs.* 12, 13.
Gen. L. New H., *c.* 1, *Secs.* 33, 34.
Rev. St. Me., *c.* 1, *Sec.* 3.
Pub. St. R. I., *c.* 24, *Sec.* 17.
Rev. St. N. Y., *v.* 1, *p.* 125, *Sec.* 6.
Revis. of N. J., *p.* 1121, *Sec.* 4.
Rev. St. O., *v.* 1, *Sec.* 79.
Rev. St. Ill., *Coth. Ann. Ed.*, *p* 1184, *Sec* 4.
Rev. St. Wis., *p.* 1464, *Sec.* 4974.
50 *Me.* 381, 48, 369.
49 *Me.*, 527, 507

and several other states.

We have been unable to find an instance where a statute of this nature has been adopted that does not carefully guard against amnesty. Colorado is one of the few states which has not adopted this saving measure (*Gen. St. Col.*, 1883, *p.* 920 *Sec.* 3142.

The position of the defendant in error is still further fortified by *United States vs. Reisinger*, *supra*. There Section 13, of the Revised Statutes was under consideration, which is as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The question there raised went to the breadth of the application of the foregoing provision. Reisinger had been indicted for a violation of an act of congress, entitled: "An act relating to claim agents and attorneys in pension cases," approved June 20th, 1878. By an act of congress approved March 3, 1881 (21 *Stat.* 408, *Rich. Suppl't Rev. Stat.* 386) it was provided that the provisions of section 5485 of the Revised Statutes shall be applicable to any person violating the provisions of the aforesaid pension act. But the act of June 20th, *supra*, was in

terms repealed by an act of congress approved July 4th, 1884 (23 Stat. 98) without any expressed provisions therein saving the right to the United States to prosecute for offenses committed in violation of said act prior to the repeal of the same. Reisinger's offense occurred on the 8th day of January, 1883, and therefore, prior to the repealing act of July 4th, 1884. Whether he could be punished in that state of the law depended on the scope of section 13, *supra*. If prospective, it quashed his case; otherwise not. The court, speaking by Mr. Justice Lamar, as illustrative of the evident intention of congress in enacting section 13, cites section 5598, Rev. Stat., and says:

"That the legislature intended that this 13th section should apply to all offenses is shown by § 5598, Rev. Stat., under the title of 'Repealed Provisions,' which is as follows: 'All offenses committed and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made.

It was the obvious intention of § 13, Rev. Stat., to extend this provision to the repeal of any statute not embraced in such revision."

The case at bar is not at all dissimilar, and it may be urged with no less force and reason that section 3, chapter 4, Gen. Stat. Minn., 1878, as interpreted by the spirit of chapter 121 of that compilation, is prospective in character and reaches "any statute *not embraced in*" the compilation known as the General Statutes, 1878, as well as those therein contained. In other words, chapter 121 sustains the same relation to section 3 of chapter 4 of the General Statutes of Minnesota as section 5598 does to section 13 of the Revised Statutes of the United States, and this is obvious from a careful study of the provisions of both the state and federal statutes. Title 74 (Rev. Stat.) is entitled "Repealed Provisions." Section 5596 repeals generally all Acts of Congress passed prior to December 1, 1873, any portion of which is embraced in said title 73. Section 5597 provides that "all offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal may be prosecuted and punished in the same manner and with the same effect, as if said repeal had not been made." Chapter 121, Gen. Stat., 1878, together with chapter 122, declares generally and specifically what prior acts are thereby repealed. Section 3 of said chapter 121, is as

follows: "The repeal of the acts and resolves, and parts of acts and resolves, *revised and re-enacted herein*, * * * shall not revive any law heretofore repealed or suspended," etc. Section 5 of said chapter 121, already quoted, is as follows: "It shall not affect any penalty or forfeiture incurred before it takes effect under any of the laws repealed," etc.

The similarity of the state and federal statute is seen with best advantage if we place them side by side:

FEDERAL STATUTES.	MINNESOTA STATUTES. (Ch. 121 Gen. St. 1878.)
Sec. 5597. *The repeal of the several acts embraced in said revision (Rev. Stat., U. S.) shall not affect any act done, etc., before the said repeal.*	Sec. 4. *(The repeal of the acts and resolves revised and re-enacted herein) shall not affect any act done, etc., before the repeal takes effect.*
Sec. 5598. *All offences committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect, as if said repeal had not been made.*	Sec 6. "*It shall not affect any penalty or forfeiture incurred before it takes effect under any of the laws repealed, etc.*"

The similarity in both letter and spirit is too plain to admit of doubt that the language of the court in the Reisinger case, *supra*, applies with equal strength to section 5 of chapter 121, of the Minnesota statute. If so, it leaves no doubt that section 3, chapter 4, Gen. Stat., 1878, is not restricted in scope to said General Statutes, but applies as well to all subsequent legislation in that state.

It may be contended that the supreme court of Minnesota has substantially passed upon the application of section three of chapter 4, of the General Statutes of that state to a case like that at bar, in the case of *State vs. McDonald, et al.*, 20 Minn., 136.

Seemingly there is force to that contention, but, in reality, none.

The defendants in that case were indicted at the December term, 1871, under sec. 7, ch. 98, of the General Statutes of 1866, alleging the offense to have been committed June 17th, 1871. Section 7, *supra*, was amended by sec. 1, ch. 54, Laws

of Minnesota for the year 1872. The offense for which the defendants were indicted was the unlawfully assembling and pulling down a dwelling house. At the time the offense was committed the penalty therefor as prescribed by section 7, *supra*, was "imprisonment in the state prison not more than seven years nor less than than three years."

This was amended by section 2, chapter 74, of the laws of 1872, by adding to the penalty previously existing the following words: "*or by fine not exceeding one thousand dollars in the discretion of the Court.*" The supreme court of the state held that inasmuch as the later statute added to and altered the earlier one, it was *ex post facto* as to the defendants.

The defendants were indicted and *plead to the indictments;* but instead of the case being tried at the pending term of court, it was continued until the following term, which was not held until after a session of the state legislature. At that session the statute was amended as above indicated. When the case was next called up, the court *granted leave to the defendants to demur* to the indictments, and the demurrer was based upon the aforesaid change in the statute. It does not appear from the decision nor from any of the attainable records of the clerk's office, that the attention of the court was called to section 3 of chapter 4, *supra*, or that the purpose and effect of that statute was ever suggested on argument, or otherwise. The case is not deemed by the bar of Minnesota as in any sense a judicial expression by the supreme court of that state touching the scope of said chapter 4, nor should it be so regarded on this appeal. It is sufficient to say that the question was neither raised before nor passed upon by the court.

The only other case when the court of that state has considered said section 3 as affecting this appeal in any way, is *Miller vs. Miller*, 39 *Minn.* 376. As the decision is brief and recites all the essential facts we print it entire, as follows:

"Section 47, Chapter 66, Gen. St. 1866, provided that service of a summons in an action in the District Court may be made by the sheriff of the county where the defendant is found, or by any other person not a party to the action. This is Section 56, Chapter 66, Gen. St. 1878. By Section 2, Chapter 185, Sp. Laws 1877, it was enacted that summons to be served in the county of Ramsey shall be served by the sheriff of said county, or one of his deputies, etc. Chapter 371, Sp. Laws 1881, repealed said Chapter 185. Defendant thereupon contends that

Section 2 of the act of 1877 repealed, so far as Ramsey county was concerned, so much of said Section 47 as allowed the service of summons in Ramsey county by any person other than the sheriff; and that according to Section 3, Chapter 4, Gen. St. 1866, the repeal of Chapter 185 did not in that respect revive said Section 47. Said Section 3, Chapter 4, reads: Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived unless it is so specially provided. We doubt that this applies to repeals by implication, or those affected by the provisions of an act being inconsistent with some provisions of a former act. But, however this may be, we are satisfied it does not apply to a case like this. Section 47 established a general rule, intended to be uniform and operative throughout the state. The act of 1877 established a different rule for Ramsey county—excepted that county from the general rule. When the act excepting it was repealed, that county came under the operation of the general rule established for the whole state. This must have been the understanding of the legislature, for if summons must still be served in Ramsey county by the sheriff, as defendent contends, then nothing whatever was effected by the repeal of Section 2, Chapter 185. The proposition leads to this result: that while, for the rest of the state, there is a statute prescribing who may serve summons, there is no such statute operative in Ramsey county—a result which the legislature could not have intended. Order affirmed."

It will be observed, in the first place, that the above decision went simply to the first clause of said Section 3; and, in the second place, that the court thereby hold that the Section had no applicability to the case before it. There the general law of that state provided for the service of summons throughout the state; a later law made special provisions for Ramsey county, which later law was subsequently repealed. The court hold in effect that Ramsey county having been made an exception to the general rule, the general rule at once became operative throughout that county the moment the exception was removed, and, manifestly, Section 3 of Chapter 4, had no application to such an excepting statute as the one repealed.

It cannot be successfully urged therefore that the case of *Miller vs. Miller, Supra.* is at all in point on this appeal.

What may have been the purposes of the commissioners who revised the statutes of 1866 as disclosed by the report submitted by them to the legislature of Minnesota, in incorporating

section 3 into chapter 4, of the general statutes, is wholly unimportant at this time. Courts for a very long time, both in England and this country, have evinced a marked disinclination to countenance such enquiries. Thus, in the *Matter of the Dean of York*, (2 Q. B., p. 34.) "the report of the ecclesiastical commissioners was applied to on both sides: on the one, for proof that the late statute was not meant to apply to the visitatorial power, because no recommendation to that effect is given," and the court said: "We have frequently had occasion to observe that the courts have no right to look at similar reports for the direct purpose of construing the statutes founded upon them, which must speak for themselves."

Again, in *Martin v. Henning* (18 Jur. 1004.) *Pollock, C. B.*, says: "I must protest against the construction of the statute being at all controlled by that. (*Report of Common Law Commissioners.*) Several wholesome rules for the construction of statutes are given in Bac. Ab., tit. 'Statute,' I, and the reports of commissioners appointed by the Crown are not mentioned among them." Whereupon, *Parke*, B., remarked: "Lord Denman in his judgment in a very important tithe case relied on the report of the real property commissioners. There can however be no doubt that that is not a legitimate mode of construing statutes."

So, again, in *Regina v. Whittaker* (2 C. & K., 640.) *Denman, C. J.*, says: "In construing an act of Parliament, we cannot go into what was said in either House of Parliament before the act was passed."

So, too, in *Gorham v. Bishop of Exeter*, (5 Ex. p. 666), *Anderson, B.* remarked: "We do not construe acts of Parliament by reference to history In deciding *Ryder v. Mills*, (3 Ex. 853) on the Factory Act, we did not act upon what we knew had taken place in Parliament."

In *Barbat v. Allen*, (7 Ex. p. 616.) *Pollock*; C. C. says: "The history of a clause in a statute is certainly no ground for its interpretation in a court of law; and I would guard myself against being considered as resorting to any such means."

In *Regina v. Capel*, (12 A. & E. 411,) *Denman, C. J.*, says: "We were pressed with a history of the introduction of this provision into the act in its passage through Parliament. Of such facts, if capable of being ascertained, we are not permitted judicially to take notice."

The following cases containing the same doctrine are respectfully submitted:

Arding v. Bonner, 2 *Jur. N. S.* 763.
Ewart v. Williams, 3 *Drew.*, 21, 23.

There is a marked paucity of American decisions directly upon this phase of the question; but in *Bank of Pennsylvania v. The Commonwealth*, (19 Pa. St. p 156) the court characterizes matters relevant to and preceding the passage of an act as of "no value" and "delusive and dangerous," and further remarked that the impropriety of giving any attention to facts and circumstances outside the record ought to be very easily seen."

No doubt, courts will sometimes resort to legislative journals and records when embarrassed, either by the obscurity of the text or the ambiguity of the terms of a statute.

Blake v. National Bank, 23 *Wall.*, 207.

But it cannot be said that the American decisions discover a disposition to observe any other or different rule than that which has been adopted by the English courts and illustrated by the foregoing citations.

This court *in Aldridge v. Williams*, (3 *How. p.* 24,) while having under consideration the tariff measure of March 2, 1833, uses the following language: "In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed, is the will of the majority of both houses, and the only mode in which that will is spoken, is in the act itself; and we must gather their intention from the language then used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed;" and reaffirms this doctrine in *United States v. Union Pacific Rd. Co*, 91 *U. S. p.* 79.

This rule is unquestioned by the courts of the several states of the Union, and, in one form or another, has been declared by most of them.

The statute in question employs the term "penalty." The exact words are: "Nor shall such repeal affect * * * any penalty incurred." Very few, if any, terms employed by law writers are attended with less confusion or ambiguity than the word penalty. Defined by the lexicographer, it is "punishment." (*Anderson's Dict. of Law.*) That meaning is given to the

term, as this court has pointed out in *United States vs. Reisinger, supra*, by Blackstone, and the definition is approved by this court in the Reisinger case.

The statute having employed a term of such universally accepted significance, in a most natural use, the court will vest it with no other meaning, whatever the circumstances attending the passage of the act.

Courts feel constrained to give the words of statutes their natural meaning, even when there is the strongest ground for supposing that such a construction is not consonant with the intention of the legislature."

Re. v. Cammissioners 5 *A. & E. p.* 86.
Nowell v. Mayor of Worcester, 9 *Ex. p.* 465.

The words of a statute, when umabiguous, are the true guide of the legislative will.

Rich v. Keysor, 54 *Pa. St.* 86.
United States v. Ragdale, Hempst. 497.
United States vs. Warner, 4 *McLean*, 463.

On subjects relating to courts and legal process, the legislature are to be considered as speaking technically, unless from the statute itself, it appears that they used the terms in a more popular sense.

Merchant's Bank v. Cook, Pick. (Mass.) 405.

Where a word has a clear and settled meaning, at common law, it is to have the same meaning in construing a statute in which it is used.

Adams v. Turrentine, 8 *Ired. (N. C.) L.*, 147.
United States v. Magill, 1 *Wash.*, 463.
Ex Parte Vincent, 26 *Ala.*, 145.
Apple v. Apple, 1 *Head. (Tenn)* 348.

When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise, and those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded.

West. U. Tel. Co. v. District of Columbia, 2 *Cent. Rep.*, 694.

Nor will courts speculate on the intention of the legislature when the words it has used are plain.

Samuel v. Nettleship, 3 *Q. B., p.* 192.

But it may be fairly insisted that the term penalty has acquired a statutory interpretation by Chapter 121 of the General Statutes, 1878, of Minnesota. We quote only sufficient portions of the provisions of that chapter to establish the point we desire to make.

§ 3. The repeal of the acts and resolves, etc., revised and re-enacted herein, etc., shall not revive any law heretofore repealed.

§ 4. It shall not affect any act done, or any right accruing, accrued or established, or any proceedings, doings or acts ratified or confirmed, or any action or proceeding had or commenced *in a civil cause*, before the repeal takes effect, etc.

§ 5. It shall not affect *any penalty or forfeiture incurred* before it takes effect, under any of the laws repealed, etc.

Clearly, section 4, *supra*, contemplates civil actions and proceedings, while the following section just as manifestly implies criminal actions.

III.

The position is certainly untenable that the provision of the Minnesota statutes, which invests the Governor of that state with the power and duty of designating the day of execution, contravenes the constitutional provision according to the accused the right to be tried by the law of the land.

The court below was averse to listening to a discussion of that proposition, nor would the defendant in error now advert to it except out of deference to the recognized ability of the opposing counsel, by whom it has been raised, and is now insisted on.

Without essaying the difficult task of defining the phrase "due process of law," or "law of the land," we respectfully urge that one who has been tried to judgment in strict conformity with every constitutional right, and receives a sentence of the law in full accord therewith, is in no position to complain that the law of the land has been violated because it is left to the chief executive of a state to fix the day on which that sentence shall be executed. Such a contention does violence to the spirit as well as the letter of Magna Charta itself.

"No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor we will not pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land."

Magna Charta, Cap. 29.

The words, "by the law of the land," as used originally in Magna Charta, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of due process of law is, that *it means law in its regular course of administration, through courts of justice.*

2 *Kent Com.*, 13.

It may be stated generally that due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights.

Cooley on Const. Lim., 355.

Mr. Webster's definition in the case of *Dartmouth College vs. Woodward*, 4 *wheat.* 518, need only to be suggested to be remembered. "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

It implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

Zeigler vs. South and North Ala. Rd. Co., 58 *Ala.*, *p.* 599.
People vs. Supervisors, 74 *N. Y.*, 234.

The language of Mr. Justice Johnson in *Bank of Columbia vs. Okely*, 4 *Wheat.*, 235, and approved in *Hurtado vs. California*, (110 *U. S.*, 516), is appropriate in this connection: "As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written, with a view to this exposition, the good sense of mankind has at last settled down to this: That they were intended to secure the individual

from the arbitrary exercise of the process of government, unrestrained by the established principles of private right and distributive justice."

This court has said in *Hurtado vs. Calfornia, supra*, that "there is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms. * * * It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or merely devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

The foregoing citations upon this branch of the case, drawn from a large array of American authorities, selected it may be not with commendable discernment or judgment, serve, nevertheless, to fairly indicate the meaning with which our courts have invested the phrase, "law of the land." Tried by these interpretations, the Minnesota statute in question, in no wise intrenches upon the constitutional rights of the plaintiff in error. With much greater reason might it be urged that a presentment by a grand jury, time honored and well nigh universal in its observance, is an inalienable constitutional right; but this Court in *Hurtado v. California, supra*, has said that the words "due process of law" in the fourteenth amendment of the Constitution of the United States, do not necessarily require an indictment by a grand jury in a prosecution by a state for murder.

In all the cases examined upon this subject, and they are very numerous, we have failed to meet one, which, by the most forced construction, supports in any measure, the contention of the prisoner's counsel.

In his case, the law, in the fullest meed of justice, heard before it condemned; proceeded upon inquiry and rendered judgment *only after trial*. Whether his case be viewed from the standpoint of Magna Charter, or the Fourteenth Amendment of the Federal Constitution, every principal of liberty and justice, guaranteed by either, has been accorded to and enjoyed by him.